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Chairman: Mr. Enkhsaikhan ..... (Mongolia)

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The meeting was called to order at 10.15 a.m.

Agenda item 150: Report of the International Law Commission on the work of its fiftieth session *(continued)* (A/53/10 and Corr.1)

1. **Mr. Preda** (Romania), referring to chapter IV of the report of the International Law Commission (ILC) on the work of its fiftieth session, entitled "International liability for injurious consequences arising out of acts not prohibited by international law" (prevention of transboundary damage from hazardous activities), said that it could not be denied that there was a conflict between the right of a State to engage in lawful activities, particularly in its territory, and its right to enjoy its facilities and amenities without being disrupted by the activities of another State. In order to reconcile those rights, States must exercise restraint, so as to avoid harming the environment of other States. At the same time, it was obvious that there would be situations in which significant harm or damage had actually occurred, requiring that the States concerned invoke remedial or compensatory measures, which often involved issues concerning liability. Those aspects should be borne in mind in preparing a document that commanded consensus, instead of adopting provisions which obliged States to establish an environmental impact assessment process for virtually all activities that might cause significant transboundary harm. Consequently, the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law should be limited to particularly hazardous activities. In that respect, his delegation supported the proposals that a group of legal experts within the Commission should carry out a feasibility study which would clarify the issues.

2. With regard to chapter V of the report (Diplomatic protection), his delegation supported the suggestion that the working group should focus on the issues raised in chapter one of the outline proposed in the previous year, entitled "Basis for diplomatic protection". His delegation believed that, in its future form, diplomatic protection should be a continuation of the Vienna Conventions on Diplomatic and Consular Relations, and an amendment to them. In view of the proliferation of cases of multiple nationality and the increasing complexity of economic and commercial relations, it was necessary to prepare draft rules in order to define the rights and obligations of the State that had personal jurisdiction and the State that had territorial jurisdiction. Furthermore, a clearer distinction must be made between diplomatic protection and consular assistance which States gave their own nationals abroad.

3. Referring to chapter VI of the report (Unilateral acts of States), he said that the first report of the Special Rapporteur represented substantial progress in the consideration of the topic. If agreement was to be reached on that key issue, the Commission must focus on aspects concerning the elaboration and conditions of validity of the unilateral acts of States, on the understanding that States had the right to determine the existence of such acts.

4. His delegation, which attached particular importance to chapter IX (Reservations to treaties), believed that, although the principles of the 1969 Vienna Convention should be preserved, there was a need to clarify the ambiguities in the existing regime. The Vienna Convention on the Law of Treaties did not provide any mechanism for assessing whether a reservation was incompatible with the object or purpose of a treaty, nor did it indicate which body was entitled to make such assessments. In the view of his delegation, the decision to withdraw or revise a reservation must always lie with the State and could not emanate from a monitoring body established under a treaty. Moreover, the legal regime for reservations was unitary and, therefore, there was no valid basis for applying a separate regime to human rights treaties. However, the right balance should be struck between the unitary character of the regime of reservations and the specificity of human rights instruments. Treaty bodies did not have the power to make determinations regarding the validity of particular reservations, since that was within the competence of the reserving State and other States parties to the treaty. As to the draft guidelines on reservations to treaties, a unilateral statement by which, as indicated in draft guideline 1.1.6, a State increased its commitments or its rights beyond those stipulated in a treaty, should not be considered as reservations.

5. With regard to chapter VII of the report (State responsibility), it was very important to develop a basic instrument to regulate international relations as soon as possible. Romania supported the distinction between "primary" and "secondary" rules, and believed that the latter should be codified. The concept of State crimes should not be retained in international law, although some wrongful acts — for example, acts of aggression — could be treated in a distinct manner, taking into account their serious impact on international relations. The best solution would be to recognize that individuals had penal responsibility and include special provisions for wrongful acts in cases of *jus cogens* and *erga omnes* obligations. The concept of objective responsibility should be maintained in relation to hazardous activities.

6. **Mr. Sepulveda** (Mexico) said that States carried out many unilateral acts in the context of their international relations, which made it very difficult to establish rigid limits on the study of the topic. The Commission should not concentrate on formal legal acts, since that would exclude an important area of State conduct and reduce the value of its work, the purpose of which was to promote mutual trust, confidence and security in inter-State relations. The Commission should therefore include in the study of the topic acts which, although they could not be considered as formal legal acts, gave rise to consequences in international law. He was not convinced of the need to include unilateral acts carried out by States against other subjects of international law, although he agreed with the Commission that that question could be resolved at a later stage of the study of the topic.

7. On the topic of State responsibility, he hoped that the commencement of the second reading of the draft articles would give rise to a fruitful debate and lead to the early completion of the Commission's work on the topic. Given the lack of agreement on the distinction that should be drawn between State crimes and delicts, inclusion of that distinction in the draft articles would delay the Commission's work. The notion of State crime should therefore be excluded. International law did not recognize that States could be subjects of criminal responsibility nor did any mechanism exist to enforce such responsibility. There was no reason, moreover, to include a legal concept which the international community was not yet prepared to accept. The degree of a State's responsibility depended on the nature of the rule that had been violated and the consequences of that violation. As the Commission had indicated, it was necessary to determine varying degrees of responsibility and to leave aside the controversy over the distinction between criminal and delictual responsibility. The point of departure should be that any internationally wrongful act committed by a State gave rise to the international responsibility of that State and the response to that unlawful conduct should be determined, bearing in mind the nature of the obligation that had been violated. The Commission's discussions should focus on the degrees of responsibility and the consequences of failure to fulfil that responsibility in order to establish an objective criterion based not on the damage or blame (*dolus* or *culpa*), but rather on the magnitude of the wrongful act and its effects. Even though the problem of the distinction between crimes and delicts had not been resolved at the Commission's fiftieth session, his delegation believed that the Working Group's conclusions, which were set out in paragraph 331 of the Commission's report, were for the time being the most appropriate way of ensuring the continuity of the Commission's work on the draft articles on State responsibility.

8. Special consideration should be given to Part One, chapter V, of the draft articles on State responsibility, which dealt with the circumstances that precluded wrongfulness. While it was true that that chapter contained legal concepts that were generally recognized in the internal laws of States, it could not be claimed, as had been done in draft article 30, that the wrongfulness of an act of a State was precluded if the act was in response to another wrongful act committed by a wrongdoing State, since that would subvert the system of rules which the Commission was attempting to establish in the field of State responsibility. That article and Part Two, chapter III, should be carefully reviewed to ensure that any coercive measure that might be included in the draft articles strictly conformed to the international legal order in force.

9. The dispute settlement mechanism envisaged in the draft articles represented an important contribution by the Commission. Its effectiveness should not be prejudged on the grounds that States would not accept binding settlement of disputes in that field. Nor could the objection be raised that it would be a specialized system, since there were special regimes for the law of the sea or in the field covered by the recently established International Criminal Court. In any case, any obligations which States might wish to assume in that area could be considered in a diplomatic conference.

10. The Mexican delegation agreed with the Special Rapporteur's suggestion to replace the phrase "State which has committed an internationally wrongful act" by "wrongdoing State", since that would lend greater clarity to the draft articles. It would also be necessary to review and clarify the terminology used in other parts of the draft articles, especially the definition of "injured State".

11. He agreed with the Commission's proposal that the draft articles should cover all internationally wrongful conduct constituting a breach of an international obligation, whether arising from positive action or an omission. There was no requirement of damage for a State to incur responsibility for an internationally wrongful act. Questions of damage or fault had been referred to the primary rules and should not be included in article 1. Their exclusion, however, could have a significant impact on the activation of the mechanism of responsibility. Consequently, it might be advisable to review article 1, bearing in mind the definition of "injured State" that might be adopted and the degrees of responsibility that might eventually be established in the draft articles.

12. The Mexican delegation accepted the Special Rapporteur's proposals concerning articles 2 and 4 and, in

particular, the deletion of draft article 2. With regard to draft article 5, even though there might be a justifiable need to ensure that a State did not evade its responsibility through restrictive qualifications based on its domestic laws, the mere deletion of the reference to that law would not resolve the problem. Instead, it would present difficulties, since it was precisely internal law that defined what was considered as a State organ.

13. In general, the Special Rapporteur's suggestions regarding articles 6 to 15 *bis* deserved consideration. He also agreed that the responsibility of international organizations and of States for the acts of international organizations should not be included in the current draft articles, since that subject had its own special characteristics. Moreover, a decision could not now be taken on the final form of the draft articles and would have to wait until the second reading was at a more advanced stage. However, the essence of the obligations which States would have to assume was the justification for taking up the topic of responsibility in the context of a diplomatic conference.

14. On the subject of nationality in relation to the succession of States, Mexico did not believe that it would be appropriate to expand the study of the question of the nationality of legal persons, since that would severely hamper the Commission's work. It wished to recommend that the Special Rapporteur should continue to examine the question in the context of State succession and underscored the importance of the domicile of legal persons as a determining element in any attribution of nationality.

15. On the topic of reservations to treaties, he thanked the Commission for the set of six draft guidelines that had been prepared for inclusion in the future Guide to Practice, and for the Special Rapporteur's analytic and structured reports. He also agreed with the criteria for distinguishing between reservations and interpretative declarations, which were set out in paragraphs 517 to 519 of the Commission's report.

16. On the question of the definition of reservations, he supported the text of draft guideline 1.1, which combined the elements contained in the Vienna Conventions, as well as the decision not to modify a definition which had been entrenched in the conventional legal order, since there was always some risk in altering definitions that were well entrenched in State practice. He took note of draft guideline 1.1.1, on the object of reservations, and in particular of the fact that it would be reviewed in the light of the debate on interpretative declarations. He agreed with the Commission that a reservation could refer in general to the way in which the State or international organization making the reservation proposed to implement the treaty as a whole but, because of the way in which it was drafted, the guideline could include certain types of interpretative declarations. In order to avoid that situation, reference could be made to the object of modifying or excluding the legal effects of the treaty in question. He supported the contents of draft guideline 1.1.2 and stressed the importance of maintaining the deadlines for the entering of reservations.

17. With respect to draft guidelines 1.1.3 and 1.1.4 on reservations having territorial scope, it might be necessary to limit them to so-called "colonial" situations so that they would include only those territories which, for one reason or another, were subject to the jurisdiction of the State formulating the reservation. He was not convinced that the two guidelines should encompass the rather uncommon practice of excluding all or part of the State's own territory. The point was not to ignore a situation that could arise from the application of article 29 of the 1969 Convention, but simply to ensure that the future Guide to Practice covered only situations that were well established in State practice.

18. The guideline on reservations formulated jointly was appropriate; he understood that it was necessary to establish the permissibility or impermissibility of the reservations. Although the Commission had adopted a provisional text on the subject, it would be useful to clarify and specify the scope of the entire set of draft guidelines adopted thus far. In relation to the request contained in paragraph 41 of the report, his delegation felt that unilateral statements by which a State purported to increase its commitments or its rights in the context of a treaty beyond those stipulated by the treaty itself should not be considered as reservations, since the latter concept reflected instead the idea of limiting or restricting the scope of a treaty's provisions. Moreover, such unilateral statements were not binding on the other parties to a treaty.

19. Mexico congratulated the Commission on the organization of the seminar commemorating its fiftieth anniversary, awaited with interest the publication of the proceedings of the seminar and also congratulated the Commission's secretariat for having organized the seminar and issued the publications referred to in paragraphs 548 and 549 of the report. It would be very useful to include, on the International Law Commission Web site, advance copies of forthcoming reports as soon as possible after each session and even before the printed versions were issued in all the official languages. That would facilitate the analytical work of Governments, since the report was published only a short time before the item was discussed in the Sixth Committee.

20. He took note of the topics which the Planning Group had selected for the long-term programme of work, and stressed

his particular support for the idea that the Commission should take up issues related to international environmental law. States had recognized, on a number of occasions, the need to promote the codification and progressive development of environmental law. One of the topics that could be studied was that of transboundary resources, a term which he preferred to "shared natural resources", which was used in the report. Specifically, the Commission could study, in the near future, the issue of groundwater and transboundary deposits, in which it already had some experience. Lastly, the session held in New York had been very useful in that it had promoted communication between the International Law Commission and the members of the Sixth Committee, and he hoped that that arrangement would be repeated in the future.

21. **Mr. Hilger** (Germany) said, in relation to unilateral acts of States, that it was reasonable to limit the scope of the topic from the outset so that the analysis would be more thorough and could progress more rapidly; it would also be desirable to distinguish among various types or categories of unilateral acts and to focus on statements directed towards other States. His country therefore supported the Special Rapporteur's proposal that the study should be confined to unilateral acts of States performed with the intention of producing specific effects in international law, and that other unilateral acts, such as those of a non-legal nature, those of other subjects of international law or acts and conduct of States not performed with the intention of producing specific effects in international law, should be excluded. For the same reason, issues such as silence, acquiescence and estoppel should be taken up at a later stage, when the Commission had made further progress on the issue of statements directed towards other States.

22. He welcomed the adoption, at the Commission's forty-ninth session, of a set of 27 draft articles with commentaries, on the nationality of natural persons in relation to the succession of States, and supported, in general, the Working Group's conclusions on the nationality of legal persons in relation to the succession of States. The issues involved in that topic were too specific and the practical need for their solution was not evident. Moreover, he questioned the effectiveness of studying the nationality of legal persons in international law in general, as the Working Group had proposed as a first option, since it would overlap with other topics which the Commission was currently considering, such as diplomatic protection, and would make it difficult to keep the study within reasonable limits. Therefore, the second option proposed by the Working Group seemed more practical and should be chosen by the Commission. Nonetheless, he questioned the need to extend the study to problems such as that of the status of legal persons and, possibly, the conditions of operation of legal persons. The diversity of national laws on the subject was another reason for limiting the topic to ensure that the Commission's work was effective. Germany therefore supported the Working Group's conclusion that the Commission should not study the second part of the topic of nationality in relation to the succession of States.

23. With respect to reservations to treaties, he recalled that he had already indicated the preceding year that he supported the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, and welcomed the Commission's consensus on the maintenance of the so-called Vienna regime established in three conventions on the law of treaties. The Commission's recent activities on the subject of reservations to treaties had already had a considerable impact on the attitudes and practices of States. The importance of ensuring that treaties included specific provisions limiting reservations was increasingly recognized, as illustrated by the work done on the topic by the Asian-African Legal Consultative Committee and the Council of Europe's Committee of Legal Advisers on Public International Law. He accepted the six draft guidelines on the definition of reservations and interpretative declarations adopted by the Commission on first reading, which constituted an introduction to the much-needed Guide to Practice. Undoubtedly, the question of the definition of reservations and interpretative declarations was interesting, as shown by the Special Rapporteur's impressive legal analysis and the Commission's debate. However, it must be borne in mind that most of the real problems that arose in connection with reservations, interpretative declarations and possible objections to them were not related to their definition. The elaboration of complicated definitions could be of merely theoretical interest and could even be counter-productive from a practical standpoint; that applied most particularly to draft guidelines 1.1.5 and 1.1.6 and to the attempt to define so-called "extensive" reservations.

24. With regard to reservations relating to non-recognition (draft guideline 1.1.7), his delegation shared the Commission's view that such statements should be governed by the rules on recognition of States and not by those on reservations. Any reservation assumed a treaty-based or contractual relationship between the reserving party and the other parties to the treaty, while in the case of statements of non-recognition, it was in fact the contractual capacity of a party that had been denied. He supported the suggestion by the Special Rapporteur concerning a parallel discussion of reservations and interpretative declarations, which would

highlight similarities and differences between the two categories, especially in view of the fact that a great number of so-called interpretative declarations constituted full-fledged reservations, some of which were inadmissible.

25. Leaving the consequences of inadmissible reservations to a system of declarations and objections between the parties to a multilateral treaty, as provided for in articles 20 and 21 of the Vienna Convention on the Law of Treaties, was not completely satisfactory in the case of a reservation that was clearly excluded under article 19. Considering a prohibited reservation null and void so that the State would be bound by provisions which it expressly excluded from its consent would contradict the very essence of treaty law. His delegation supported the Special Rapporteur's conclusion that it was always the exclusive responsibility of the State itself to rectify the defect in the expression of its consent to be bound. To do so, the State could withdraw altogether the inadmissible reservation, amend it along lines compatible with the object and purpose of the treaty, or refrain from becoming a party to the treaty. The incompatibility of a reservation with the object and purpose of a treaty and the consequences resulting therefrom must be decided in an objective way. As the International Court of Justice had stated in its advisory opinion on the Convention on Genocide, where a State's reservation was not compatible with the object and purpose of a convention, that State could not be regarded as being a party to the convention. That principle created considerable difficulties when applied in practice. The lack of a mechanism for objectively deciding the question of whether a reservation was compatible with the object and purpose of a treaty left the matter in the hands of the States parties. It should be asked whether, if in the case of a reservation contrary to article 19 of the Vienna Convention, States had to object at all in order to prevent it from being effective. State practice in that field differed. States rarely objected to reservations no matter how far-reaching their content might be. His Government hoped, therefore, that, at the fifty-first session the following year, the Special Rapporteur and the Commission would try to find convincing solutions to that very complex problem, which stemmed from ambiguities and lacunae in the Vienna regime. A guide prepared by the Commission offering practical solutions to the problem of inadmissible reservations and its effects would necessarily be of a residual nature and leave the Vienna system intact, but might fill in gaps and in the course of time become a well-respected code for that question.

26. **Mr. Monagas-Lesseur** (Venezuela) said that the nationality of legal persons was a question that should be considered more broadly than in the context of succession of States.

27. The report of the Special Rapporteur rightly underscored the importance of unilateral acts of States in the international sphere and determined those which might be called purely unilateral acts, or those acts which, performed by one or several States as a sole manifestation of will, could impose, without any necessity to do so, acceptance or any reaction on the part of another State. The Commission pointed out that one of the main characteristics of that category of acts was its autonomy from two different points of view; the unilateral legal act under consideration by the Commission was an act that differed from other previous, simultaneous or subsequent legal acts. Furthermore, in separating the norm from the instrument which established it and the right and obligation resulting from the norm established, the purely unilateral legal act entailed autonomous application in the sense that it did not specify acceptance by the other State. The Special Rapporteur separated the formal act from its content and concluded that it was possible that there were purely unilateral obligations and, more importantly, that the declaration was a unilateral act which could be codified since it could have diverse content with regard to substance. Under treaty law, a treaty was not the only instrument or formal legal act through which legal norms were established in the international field; in the same way, it could be considered that a declaration was not the only unilateral legal act of States. Accordingly, it could be said that a declaration was, with regard to the law of unilateral acts, what the treaty was in relation to treaty law.

28. Venezuela shared the view that those legal acts existed and functioned in international relations and that, in fact, a State might contract legal obligations with regard to another State without the consent of that State being necessary. He also agreed that the basis of its obligatory nature might be founded on a principle with the same content, scope and importance as that of *pacta sunt servanda*: the principle of *declaratio est servanda*, which was broader and more acceptable than that of *promissio est servanda* since, although there was a reference to that principle in international jurisprudence and doctrine, it would be limited to a category of material acts which might be performed through a formal act, such as a unilateral declaration. Venezuela believed that the Commission should not definitively discard the possibility that it might extend its consideration to acts of international organizations, although for the time being it was focusing its attention on unilateral legal acts of States. The Commission's work on that question

should be conducted in the form of draft articles with commentary since that would foster stability and security in international relations and promote clear, concise and systematic codification, without prejudging the final form of the draft. Venezuela hoped that the Special Rapporteur would be able to submit, the following year, a second report containing articles and commentary on some basic aspects of that category of international legal acts of States; to that end, the declaration as an instrument establishing international legal norms should be basically taken into account. It was possible to conclude a draft set of articles with commentary in the period envisaged by the Commission, considering the norms related to the law of treaties set forth in the 1969 Vienna Convention as a methodological and substantive reference, even though unilateral acts had specific characteristics.

29. With regard to reservations to treaties, it was not a matter of calling into question the provisions of the Vienna Conventions: reservations were unilateral statements from a formal point of view, which did not preclude the possibility that they might be made jointly by two or more States and furthermore might be included in the context of a treaty relationship, for which reason they required a specific regime regulating their functioning. That was a question of a unilateral statement made by a State or international organization at a specific moment, which was limited to the moment when a reservation was formulated, as indicated in draft guideline 1.1.2, which had been provisionally adopted by the Commission. Venezuela attached great importance to the guide to practice as well as the guidelines provisionally adopted by the Commission, and considered the definition of reservations in guideline 1.1 acceptable in principle. In addition to its strictly unilateral form, a reservation could also be formulated in a concerted or joint manner, which did not affect its unilateral nature. Nevertheless, the question arose whether the withdrawal by one of the States of its reservation gave rise to effects for the other States which had formulated it.

30. The question of the differences between reservations and interpretative declarations was also important. A reservation was formulated at a specific time, while an interpretative declaration could be made at any time. Furthermore, whereas the purpose of a reservation was to modify or exclude the legal effect of certain provisions of a treaty, a State would use an interpretative declaration to clarify certain provisions, with a view to the treaty's implementation. A conditional interpretative declaration could only constitute a reservation, in the strict sense of the term, if it was made at the right time and was authorized by the treaty or, failing that, did not contradict the spirit and purpose of the treaty. Venezuela also understood that it was impossible under any circumstances for a State to formulate a reservation to a bilateral treaty or agreement, for that would entail the amendment or revision and renegotiation of a specific text. Lastly, as stated in the Commission's report, the approved guidelines were interdependent, so that they could not be examined in isolation from each other.

31. **Mr. Politi** (Italy) said that recent years had seen a spectacular increase in the number and types of unilateral acts, which had traditionally been limited to the unilateral acts of States but now included a considerable number of acts of international organizations. The study should be limited to the acts of States which were "strictly" unilateral, i.e. whose purpose was to produce international legal effects and which had an autonomous character, such as for example unilateral acts of promise, recognition, renunciation and protest; that would mean excluding unilateral political acts linked to a specific legal regime, acts of other subjects of international law such as international organizations, and the attitudes, acts and conduct of States not intended to produce specific effects in international law. He agreed with the Special Rapporteur that formal declarations were the basic instruments employed by States to accomplish transactions by means of unilateral acts. Thus, in the initial phase of the Commission's work at least, the topic of unilateral acts should be limited to those acts which were also unilateral declarations, although at a later stage, and in the light of the results achieved in relation to "strictly" unilateral acts, the Commission might examine other less formal expressions of the will of States which were particularly relevant in international practice, such as acquiescence, silence and estoppel. As to whether the topic should be limited to the unilateral acts of States affecting other States or should include such unilateral acts affecting other subjects of international law, Italy did not see any reason for making a new distinction, especially as in contemporary practice many unilateral acts of States were addressed both to States and to international organizations. Italy endorsed the Commission's decision to proceed with the elaboration of draft articles with commentaries on the topic and to invite the Special Rapporteur to produce several such articles, without prejudging whether they would take the final legal form of a convention or a set of guidelines.

32. The Special Rapporteur's fourth report on nationality in relation to the succession of States dealt with the question of the nationality of legal persons. In its preliminary conclusions, which were endorsed by the Commission, the Working Group had considered two options: one would be not to limit the study to the succession of States but to make a general examination of the nationality of legal persons

under international law; the other would be to keep the study within the context of the succession of States but to include questions other than nationality, such as the status of legal persons and possibly the conditions of their operation. The Commission should continue to study the question of the nationality of legal persons in order to contribute to the codification and progressive development of the relevant international law, which was becoming increasingly important with the emergence of the phenomenon of multinational corporations. At the same time, the study should not be excessively long; from a practical point of view, preference should be given to the second option proposed by the Commission. Italy had recently submitted its observations on the draft articles on the nationality of natural persons in relation to the succession of States.

33. Turning to the topic of reservations to treaties, he said that the criterion of the object and purpose of the treaty was fundamental in determining the admissibility of reservations, although Italy was not convinced that the solutions offered by the Vienna Convention with respect to the effects of impermissible reservations were satisfactory in the case of human rights treaties, owing to the indivisible nature of their obligations; ultimately, that system might enable States to become parties to human rights treaties without really committing themselves to their implementation. On the other hand, the Vienna regime did not exclude the establishment of special regimes to fill in its gaps and resolve its uncertainties. By their very nature human rights treaties constituted a special category, one which deserved further in-depth study by the Commission in connection with the possibility of establishing a reservations regime adapted to the aims and characteristics of such treaties. He agreed that the definition of reservations and interpretative declarations should be dealt with in parallel. Against that background, the work on the Guide to Practice appeared very promising, and the guidelines adopted on the basis of the text prepared by the Special Rapporteur would be a useful tool since, without altering the provisions of the three Vienna Conventions, they were intended to dispel confusion and provide definitions to fill in the gaps in the Vienna regimes. That approach would also allow the Commission to innovate in the cases not mentioned in the Conventions, in the case of interpretative declarations for example.

34. With regard to guideline 1.1.1, on the object of reservations, if a reservation could relate to the way in which a State, or an international organization, intended to apply the treaty as a whole, the risk of across-the-board reservations would increase substantially. Notwithstanding the *caveat* contained in the additional guideline, it would be difficult to say that a reservation was impermissible when it was consistent with the definition provided by such an influential body as the Commission. His delegation agreed with the inclusion of guideline 1.1.8, on reservations having territorial scope, and guideline 1.1.4, on reservations formulated when notifying territorial application, since in both cases the practice recognized that such unilateral declarations constituted reservations within the meaning of the Vienna Convention. The Commission had taken a rather innovative approach to reservations formulated jointly, for although there were no examples of reservations of that type in the international practice, it was foreseeable that there would be frequent recourse to joint reservations in the near future, especially as a result of the participation of the European Union in an increasing number of multilateral treaties. Italy shared the view of the Special Rapporteur that so-called "extensive reservations" did not constitute reservations within the meaning of the Vienna definition, since their binding force could not be based on the treaty; the Italian Government had never had recourse to unilateral statements of that kind.

35. **Ms. Alajbeg** (Croatia) thanked the Special Rapporteur for his attempt to define and clarify the problem of the nationality of legal persons in relation to the succession of States. The topic was of the utmost interest to the States which had emerged from the dissolution of their predecessor States. Neither existing international instruments nor the draft articles contained in the Commission's 1997 report addressed the topic of the nationality of legal persons, and there were no rules of international law on the subject; the Commission should therefore continue its consideration of the question. As a first step it should produce a comprehensive study of the topic, and she supported the view stated by the representative of Israel at an earlier meeting that, before the study was undertaken, some consideration should be given to the various approaches taken in the national legislation of States. Croatia was ready to provide the Commission with information about its practices during and after the dissolution of its predecessor State.

36. Problems concerning legal persons arising from the dissolution of a predecessor State could be divided into two groups: those relating to the status of legal persons which were usually dealt with by applying the criterion of the place of registration for the determination of nationality, and those relating to property issues, which were more complex, particularly in economies where State ownership prevailed, and when there were specific rules on the organization and status of legal persons and their branches in predecessor States. In the absence of international legal instruments that would provide a uniform solution to such problems, for the

most part bilateral agreements were negotiated to settle questions relating to ownership. In that connection, Croatia had initialled bilateral agreements with Macedonia and Slovenia and was in the process of finalizing negotiations with Bosnia and Herzegovina. An agreement on mutual recognition and the normalization of relations had been negotiated with the Federal Republic of Yugoslavia, in which the parties agreed in principle to guarantee equal legal protection for the property rights of their respective legal persons. However, the status of legal persons and their branches had not yet been resolved.

37. Since Croatia had not participated in the previous debates on the draft articles on the nationality of natural persons in relation to the succession of States, she wished to make some comments on the attribution of nationality to the "persons concerned". In accordance with the general rule of presumption of nationality, the principle of habitual residence was accepted as the dominant criterion for determining the nationality of natural persons. That meant that in all cases of the dissolution of States, habitual residence was to be recognized as the genuine link between the "person concerned" and the respective successor State.

38. However, in the case of the dissolution of federal States, the criterion of the nationality of the former constituent unit of the federation tended to be more convincing than that of habitual residence. In such cases, unless otherwise agreed, the constituent units of the former State became successor States with equal rights and obligations. By virtue of application of the principle *uti possidetis*, the boundaries of a constituent unit became the international boundaries of the successor State. It should be noted that in cases of the dissolution of federations in Europe, the nationality of natural persons of constituent units had coexisted with the nationality of the former federations, for example, in the former Socialist Federal Republic of Yugoslavia. In fact, the nationality of the constituent unit was recognized as the closest connection (genuine link) for the determination of the nationality of the populations of the successor States, although the criterion of habitual residence was also embodied in the legislation of those States. The legislation of the successor State generally contained provisions which made it easier for persons habitually resident in that State to choose its nationality. Her delegation was of the view that the proposed principle of habitual residence as a dominant criterion for the automatic attribution of nationality constituted a departure from existing practice in the successor States of a dissolved federation, and would be difficult to implement systematically in international legal practice. She therefore proposed that a specific provision recognizing the nationality of the constituent unit, in addition to habitual residence, should be included in the draft articles as one of the general criteria for the automatic attribution of nationality in dissolved federations.

39. **Mr. Sergiwa** (Libyan Arab Jamahiriya), referring to the topic of unilateral acts of States (chap. II of the Commission's report), underlined the importance of the study undertaken by the International Law Commission on that issue and said he supported the comments of the Special Rapporteur on the need to clearly define unilateral acts of States and the various conditions and legal consequences of such acts. His delegation agreed with others which had pointed out that it was difficult to distinguish between unilateral acts of States having legal consequences and political acts. It was therefore essential that the study by the Commission should cover not only unilateral acts by States but also political acts.

40. The promulgation by some States of laws which had transboundary effects was incompatible with the principles enshrined in the Charter of the United Nations and in international law, violated economic and social rights and hampered the process of liberalization of the world economy. He hoped that the working group on the subject would establish legal principles concerning the consequences of the application of national rules and laws to the territory of other States.

41. With regard to the topic of reservations to treaties, he said that States had a sovereign right to enter reservations in respect of multilateral agreements and treaties, including human rights conventions; he called on Member States to encourage other countries to accede to such conventions in order to make them truly universal. It was also important that reservations should not affect the spirit or objectives of treaties.

42. Referring to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he said that after the first reading of the draft articles, which had concentrated on measures to prevent the transboundary efforts of atomic or nuclear activities, the Commission should continue to study the subject in depth. It should not confine itself to preventive measures and cooperation among States in order to limit transboundary hazards and their consequences, but should include international liability for damages, or the obligation of States responsible for causing the damage to compensate affected countries. It was also important that risks such as the dumping of nuclear material in outer space and on the high seas should be included, since they could have serious effects on the environment and the development of States.

43. Turning to the topic of nationality in relation to the succession of States, he said the system for granting nationality should establish a balance between the right to nationality of natural persons and that of legal persons, as well as emphasize the sovereign right of States in the granting of nationality. The draft articles which the Commission was preparing in that regard should only deal with the succession of States which had decided to unite of their own free will and in accordance with international law, and should not include acts prohibited by international law, such as the annexation of territories or the military occupation of any State.

44. **Mr. Pérez Giralda** (Spain) said that the topic of diplomatic protection had a solid and adequate basis in customary international law and the Commission should base its work on the generally recognized rules of State practice. The importance of the topic, which was complementary to the topic of State responsibility, warranted a codification exercise with a view to drafting an international convention on the subject which would encompass current State practice. Codification should be possible if special attention was paid to the definition of secondary rules.

45. The exercise of diplomatic protection should continue to be considered a right of States. There was no doubt that that right was based on past violations by States of the rights or interests of individuals. He nevertheless believed that the distinction, albeit artificial or fictitious, between the right of the State and the right of the individual should be maintained, as was the case even among States which had gone further in their domestic legislation in defining diplomatic protection as a right of their nationals. Those States had always reserved the possibility of invoking the absence of diplomatic protection in cases where the vital interests of the State were involved. In such situations nothing prevented States from using other types of compensation unique to their domestic law, insofar as they might wish to grant their citizens the right to hold the State responsible for not exercising diplomatic protection. Such was the case in Spain, whose courts, invoking a provision of the Constitution, had recognized that individuals had the right to ask the judge to grant them automatic indemnification for any violation of their rights as a result of a failure to exercise diplomatic protection. His delegation would provide the Commission with the materials related to that issue, as requested in paragraph 28 of its report.

46. With regard to the relationship between diplomatic protection and human rights, he said that the increasing recognition of individual rights had not been accompanied by a parallel extension of the legal means of securing such rights. Indeed, human rights and diplomatic protection usually operated at different levels in terms of the substance or content of the rights concerned, which in the latter case were largely of a patrimonial nature. His delegation therefore considered that the two institutions were developing along parallel lines and that the separate regulation of diplomatic protection as an appropriate vehicle for inter-State relations was not incompatible with the growing importance of human rights in modern international law.

47. An in-depth examination of the topic of unilateral acts of States could be of great assistance in the orientation of State practice. The scope of guidelines on unilateral acts could be extended to acts directed at other subjects of international law, on the basis that the subject in question was a State. It would also be very useful if the Commission undertook a study of the consequences of silence and acquiescence as unilateral acts which, if only implicitly, could have legal consequences for other subjects of international law. It would be most valuable to continue studying the development of the consolidated rules of the law of treaties in order to determine how far they could be adapted to the regulation of unilateral acts. It was important to establish a definition of rules of interpretation, both those governing unilateral acts and those that could be applied equally to unilateral acts and international treaties.

48. The topic of State responsibility had featured in the Commission's agenda practically since the beginning. The valuable contributions of successive special rapporteurs and the constant interest shown by States confirmed its relevance to international law. His delegation firmly believed that the process should culminate in a draft convention, since State responsibility was one of the central elements of international law, and to have it established in binding terms, with wide acceptance, would serve to strengthen confidence in the legal dealings between States. He shared the Commission's view that the doubts expressed as to the advisability of drawing up an international treaty before establishing guidelines or guides to practice were concerned not so much with the level of acceptance of most of the rules governing responsibility as with the distinction between international crimes and delicts contained in draft article 19.

49. At previous sessions his country had defended the notion that such a distinction existed in law, not only in terms of doctrine but in terms of the sociology of international relations. The international community's reaction to a simple failure to comply with one clause of a trade agreement was obviously different from its reaction to a serious, massive and persistent violation of human rights. On the other hand, it had been emphasized how difficult it was to obtain adequate institutional guarantees for determining the distinction in law between a crime and

a delict, with the associated risk that the notion of "international crime" would be subject to political manipulation. With regard to the five possible approaches suggested by the Special Rapporteur in relation to the international crimes of States, his delegation had preference for the second, which involved replacing the expression "international crimes" with "exceptionally serious wrongful acts". Such a solution would avoid the connotations of domestic criminal law. Some legal codes, indeed, could not provide for the criminal responsibility of a State, inasmuch as they did not even have provision for the criminal responsibility of legal persons generally. The new approach would also necessitate prioritizing the consequences of various categories of wrongful acts that had not been adequately spelled out in the draft as it stood.

50. **Mr. Rodríguez Vidal** (Cuba) said, with regard to international liability for injurious consequences arising acts not prohibited by international law, that the prevention of transboundary damage from hazardous activities raised important questions about the delicate balance between rules on prevention and rules on liability, which should constitute an indivisible whole. The obligation to prevent harm should be seen as an obligation of conduct, not an obligation of result.

51. In spite of globalization there were major differences between the levels of economic and social development attained by nations. Agenda 21 and, in particular, the principle of common but differentiated responsibilities had thus assumed more importance than ever. In that context it would have been most useful if the draft articles had contained provisions on international cooperation and on specific commitments to provide technical and financial assistance to developing countries, which needed to gain access to economic and scientific activities at the international level.

52. Diplomatic protection should not be sidelined in the process of developing international law, which should acknowledge its past history, its customary nature, the binding norms that had been established and the work that had gone into existing legal texts. Although the recognition of fundamental human rights created obligations *erga omnes*, there could be no doubt that diplomatic protection was a legal concept entailing discretionary prerogatives and powers for States in their capacity as subjects of international law. The conditions for the exercise of diplomatic protection and the ability of the discretionary law of States to provide diplomatic protection should not be subject to new and controversial interpretations. No distinction should be made between primary and secondary rules of diplomatic protection, given that the matter was broadly governed by international law. Any new approach to the topic by the Commission should be based on the legal practice of States and on the fact that diplomatic protection formed part of the wider regime of State responsibility.

53. With regard to unilateral acts of States, he said that the Commission was not in a position to adopt a decision on the issue, since some of its members considered unilateral acts to be a source of international law while others saw it as a source of international obligations. Neither the Special Rapporteur nor the Commission itself could therefore establish a real or meaningful distinction between the two concepts.

54. With regard to the Special Rapporteur's suggestion that the Commission should concentrate on unilateral legal acts and not unilateral political acts, the possibility of determining the category to which a given act belonged was doubtful, insofar as all unilateral acts were political, regardless of their effects. The concept of an autonomous action was artificial, as was the distinction that some made between a formal act and a substantive act. His delegation shared the view of various members of the Commission that a compilation should be made of decisions of the International Court of Justice and examples drawn from the national practice of States as a basis for elaborating rules on unilateral acts. Other sources related to the progressive development of international law in that area should also be consulted, particularly General Assembly resolutions.

55. The definition of reservations to treaties, and their various categories, raised some legal and political questions. The legal and political force, usefulness and practicality of the general rules on reservations in the Vienna Convention on the Law of Treaties lay precisely in their sensible recognition that there were very fine relative distinctions between reservations and their various categories. In that context, defining reservations and the various types of declarations need not necessarily lead to the adoption of an instrument governing them.

56. His delegation maintained its interest in the work of the progressive development of international law in the Sixth Committee and the International Law Commission. It was, however, important to keep a balance of reciprocal influence between the Commission and Member States, which should not be dislodged from their role as the principals and primary subjects of international law.

57. **Mr. Doudech** (Tunisia), referring to reservations to treaties, said that the Commission had acted sensibly by not calling into question the relevant provisions of the Vienna Conventions. The preparation, for purposes of simplification, of a Guide to Practice in respect of

reservations to treaties was of the greatest interest. Honing the concepts and clarifying certain legal aspects in respect of reservations should avoid disputes that would impede the preparation of the Guide. The objective was not to depart from the Vienna regime, but rather to strengthen it. The definition of reservations formulated by the Commission was completely in keeping with that objective. The fundamental characteristic of reservations was their purpose of excluding or modifying the legal effects of certain provisions of a treaty; that distinguished them from interpretative declarations, whose only purpose was to clarify the meaning and scope of a treaty or of some of its provisions. Interpretative declarations must in turn be distinguished from conditional interpretative declarations, which resembled reservations in their purpose and in the time at which they were formulated. As the Special Rapporteur had indicated, if any uncertainty existed in that respect, the general rule of interpretation set out in article 31 of the Vienna Convention must be used.

58. With regard to "extensive" reservations, Tunisia agreed with the Special Rapporteur that a unilateral commitment to go beyond what the treaty imposed was not a reservation because its possible binding force was not based on the treaty. The fact that one party to a treaty had unilaterally extended its obligations did not mean that the other parties were automatically required to honour obligations not set out in that treaty. Likewise, even if in logic a reservation could limit the rights that the parties would normally derive from the treaty, it was inconceivable that a reservation should extend the rights of the reserving State and the obligations which the contracting States derived from general international law.

59. In respect of unilateral acts of States, Tunisia noted that the Special Rapporteur had opted for a strict concept by limiting his analysis to acts of an autonomous nature. That should not result in complete exclusion of unilateral acts linked to a conventional or a customary norm. The definition of "unilateral act" proposed by the Special Rapporteur contained very pertinent elements. Tunisia shared the view that the basis of the binding nature of unilateral acts was the principle of good faith and the desirability of promoting security and confidence in international relations. Also, for there to be a unilateral act, the author must have clearly demonstrated the will or intention to produce legal effects, and that prevented silence from being considered a unilateral act. The Commission's next report should provide a better structured and more developed overview of the topic.

60. The Commission's work on the topic of prevention of transboundary damage from hazardous activities should culminate in the establishment of a legal regime of international liability in respect of prevention of such damage, and the obligation to prevent harmful consequences of hazardous activities should be stressed. He recalled that the principle of prevention had been set out in various multilateral instruments and that the duty of prevention had been embodied in the Rio Declaration and confirmed by the International Court of Justice. It was reasonable that the text prepared by the Commission should not specify the activities to which the articles applied, because it was difficult to establish an exhaustive list. He agreed that States were subject to an obligation of prevention, as established in draft article 3 but also agreed with the Commission that the economic level of States was one of the factors to be taken into account in determining whether a State had complied with that obligation. Similarly, he believed that a State's capacity to prevent or minimize the risk of causing harm should be a fundamental criterion in determining its obligations and liability with regard to prevention.

61. The Commission played an essential role in promoting the codification and development of international law, and its input was vital for guiding the debate on the evolution of the international legal order.

62. **Mr. Rodríguez-Cedeño** (Special Rapporteur on unilateral acts of States) said that there was a consensus as to the existence and importance of unilateral acts of States, which could be subject to specific rules that promoted security and confidence in international relations. There was also a clear consensus that there were certain acts which were purely unilateral and fell outside the bounds of conventional law. To provide a definition of the concept it had been necessary to classify unilateral acts of States by distinguishing between political and legal acts and, within the latter category, acts which came within the ambit of the law of treaties and were therefore not truly unilateral. Those distinctions had been generally accepted. It had been deemed preferable not to deal with unilateral acts of States giving rise to international responsibility, so as not to interfere with the consideration of the latter topic. The unilateral acts of international organizations could be divided into two categories: unilateral acts addressed to international organizations, which should not be examined at the same time as unilateral legal acts of States, and unilateral acts of international organizations themselves. Acts of the latter type should not be studied together with unilateral acts of States, in view of their procedural differences. All those issues would be covered in his second report, which he expected to submit to the Commission the following year. Concerning the difficulty of distinguishing between political and legal acts, he said that as the definition of unilateral legal acts became clearer, political acts would be defined by

their exclusion from it. In order to define unilateral legal acts precisely, criteria would have to be developed; work on those criteria, especially intent, was under way.

63. Concerning estoppel, silence and acquiescence as unilateral acts of States, he referred to the relevant sections of the report and said that the comments of delegations would be taken into account in order to see how far they dovetailed with the definition that was being prepared.

64. Unilateral legal acts relating to reservations and interpretative declarations warranted detailed scrutiny as some were reservations and others were interpretative declarations, including "extensive" ones.

65. The distinction between a formal act and a substantive or material act took into account the fact that a declaration could be a formal act which, although not unique, could nevertheless be important, especially for contracting unilateral obligations. It had been said that a declaration could be subject to specific rules and also that it would give rise to a restrictive concept: both possibilities would have to be considered in the second report.

66. Even though the best course at the current stage would be to prepare a series of articles with commentaries for presentation the following year, that did not prejudge the final form of the draft. He favoured formulating preliminary, general commentaries in response to the comments of delegations.

The meeting rose at 12.55 p.m.

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Chairman: Mr. Enkhsaikhan ..... (Mongolia)
later: Ms. Flores Liera (Vice-Chairperson) ..... (Mexico)
later: Mr. Enkhsaikhan ..... (Mongolia)

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98-82099 (E)

The meeting was called to order at 3.10 p.m.

Agenda item 150: Report of the International Law Commission on the work of its fiftieth session (*continued*) (A/53/10 and Corr.1)

1. **Mr. Soares** (Chairman of the International Law Commission), introducing chapter VII of the report of the Commission (A/53/10 and Corr.1), on State responsibility, said that the first report of the new Special Rapporteur, Mr. James Crawford, had dealt with general issues relating to the draft articles, the distinction between "crimes" and "delictual responsibility" (draft article 19) and articles 1 to 15 of part one of the draft. The Commission had established a working group to assist the Special Rapporteur during the second reading of the draft articles. It had referred draft articles 1 to 15 to the Drafting Committee and had taken note of the Drafting Committee's report on articles 1, 3, 4, 5, 7, 8, 8 *bis*, 9, 10, 15, 15 *bis* and A and of the deletion of articles 2, 6 and 11 to 14. However, the draft articles remained in provisional form.

2. In addition to its discussion of the issues covered in paragraphs 219 to 240 of the report, the Commission had held its first substantive debate on the distinction between "criminal" and "delictual" responsibility since the adoption of draft article 19 in 1976. In that context, it had considered the concept of "objective" responsibility, the question of whether State responsibility was of a civil or a criminal nature, the appropriateness of an analogy to domestic law, the relationship between the international criminal responsibility of States and related concepts such as individual criminal responsibility, obligations *erga omnes* and norms of *jus cogens*, international law with respect to the criminal responsibility of States and the relevance of Chapter VII of the Charter of the United Nations and other special regimes.

3. The Committee had also considered five possible approaches to the question of international crimes of States: retaining the approach embodied in the draft articles in their current form; replacing the concept of "State crimes" by that of "exceptionally serious wrongful acts"; elaborating a full-scale regime of State criminal responsibility; rejecting the concept of State criminal responsibility; and excluding the concept of State crimes from the draft, without prejudice to its general scope and to the possibility of further elaborating the idea of "State crimes" in another text.

4. The Commission had failed to agree on the treatment of "crimes" and "delicts" and, in the absence of consensus on the future of draft article 19, decided to defer its discussion of that matter, examine other aspects of part one and consider whether the issues raised in article 19 could be resolved through a systematic development of obligations (*erga omnes*), peremptory norms (*jus cogens*) and the most serious breaches of international obligations.

5. The Commission had concluded that those matters should be considered in the Working Group and covered in the Special Rapporteur's second report. If no consensus was achieved through that process, it would return to the questions raised in the first report. It had then considered chapter I, articles 1 to 4 and chapter II, articles 5 to 15, of part one of the draft (paras. 332–358 and 359–451 of the report, respectively).

6. Lastly, the Commission had asked Governments to comment, with respect to part one of the draft, on whether all conduct of an organ of a State was attributable to that State under article 5, irrespective of the *jure gestionis* or *jure imperii* nature of the conduct; and, with respect to part two of the draft, on the appropriate balance between the elaboration of general principles and of more detailed provisions (paras. 35–36 of the report).

7. Introducing chapter X of the report (Other decisions and conclusions of the Commission), he said that the Commission had divided its 1998 session into two parts, meeting in Geneva to discuss the reports of the Special Rapporteurs and in New York to adopt draft articles. In commemoration of its fiftieth anniversary, it had held a two-day seminar in Geneva, the proceedings of which would be published. It had also issued the proceedings of the Colloquium on the Progressive Development and Codification of International Law, which had been held on 28 and 29 October 1997, and an *Analytical Guide to the Work of the International Law Commission, 1949–1997*. In addition, it had established an Internet Web site.

8. With respect to its working methods, the Commission had stressed the desirability of making the Special Rapporteur's reports available in advance of the session. To that end, it had requested that the Special Rapporteurs should submit their reports on time and that the Secretariat should distribute them to members in the language submitted upon receipt, and again after editing.

9. The Planning Group had re-established the Working Group on the long-term programme of work to consider topics which might be taken up by the Commission beyond the current quinquennium. The Working Group had identified various topics for inclusion in the Commission's long-term programme of work: responsibility of international organizations, the effect of armed conflict on treaties, shared natural resources (confined groundwater and single

geological structures of oil and gas) and expulsion of aliens. It would complete its work at the next session of the Commission.

10. The Commission had continued to cooperate with other international legal bodies and had invited the President of the International Court of Justice to discuss cases currently before the Court. The Commission had prepared the draft statute for an international criminal court and had been represented at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

11. From 11 to 29 May 1998, the thirty-fourth session of the International Law Seminar had been held in Geneva with 23 participants, most of them from developing countries. Voluntary contributions to the United Nations Trust Fund for the International Law Seminar by the Governments of Denmark, Finland, Germany, Hungary, Ireland, Switzerland and Venezuela had made it possible to award fellowships to deserving candidates from developing countries; as all available funds had been exhausted, the Commission had recommended that the General Assembly should appeal to States to make voluntary contributions to the Fund so that the Seminar could be held again in 1999.

12. The Commission currently had six topics on its agenda; State responsibility, reservations to treaties, nationality and liability were in an advanced stage and required thorough consideration of complex issues, while diplomatic protection and unilateral acts of States raised questions not only of policy and substance but also of methodology. The Commission had therefore agreed that a 12-week session in 1999 was essential if it was to complete its work.

13. In closing, he said that on 14 August 1998 the Commission had adopted a resolution in which it expressed its gratitude to Mr. Roy S. Lee, Secretary of the Commission, for the friendly and efficient manner in which he had guided and assisted it and extended its very best wishes to him, on the occasion of his retirement.

14. *Ms. Flores Liera (Mexico), Vice-Chairman, took the Chair.*

15. **Mr. Szénási** (Hungary), speaking on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, said that he wished to comment on the draft articles on the subtopic of prevention of transboundary damage from hazardous activities (A/53/10, chap. IV). His delegation fully supported the Commission's view that prevention should be the core function of States in combating transboundary damage. However, there was an inherent interrelationship between the duty to exercise due diligence and the question of State responsibility when obligations were not fulfilled. The provision of answers to fundamental questions such as the ones mentioned in paragraph 32 of the report would facilitate a common understanding of the obligation of States. The Commission should not lose sight of its original task of drafting rules on liability.

16. His delegation supported the following principles underpinning the draft articles: States were not precluded from carrying out activities not prohibited by international law, but that freedom had to be counterbalanced by the obligation to minimize the risk of significant transboundary harm; the obligation of prevention required States to exercise due diligence in cooperation with other States; and adequate dispute-resolution mechanisms must be provided, so that countries would be able to resolve disputes before harm was done.

17. Those principles had received wide support in the Sixth Committee, but the Commission was now facing the most difficult part of its task, which was to produce wording to make their application possible. The following elements should be taken into account. Firstly, the scope of application must be clearly defined. His delegation accepted the residual character of the draft articles and the Commission's intention for them to have global application with respect to hazardous activities posing risk of transboundary harm. Secondly, a balance must be struck between the economic interests of States and the interests of States likely to be affected. The draft articles provided the underpinnings of such a system but, as other delegations had pointed out, the specific interests of developing States might need further recognition. While the principles of the Rio Declaration must be acknowledged, the "over-nationalization" of standards would hamper uniform application and possibly defeat the goal of the exercise. Thirdly, the procedural rules on cooperation of interested States were essential. When codifying new trends in international law, such as "Information to the public" (art. 9) and "Notification and information" (art. 10), the Commission should seek greater clarity in order to make the rules more readily applicable. His delegation agreed with other delegations on the need for consideration of more stringent procedural rules and deadlines.

18. Turning to the topic of diplomatic protection (chap. V of the report), he said that Hungary agreed with the Special Rapporteur that the diplomatic protection of the citizen and the new status of the individual as a direct beneficiary of international law did have some overlaps. However, the two institutions could be separated, and the formula introduced by the *Mavrommatis* case should be reaffirmed, for that

would clear away some of the ambiguities. His delegation supported the establishment of a working group in that connection and the Commission's proposals on its future work on the topic.

19. Turning to the topic of State responsibility (chap. VII), he said that Hungary was still hopeful that the goal of adopting rules on the subject could be achieved, although some drafting difficulties persisted. The Commission appeared to be at a new stage in its work on the topic: many Governments had submitted comments on the draft articles adopted on first reading, and the new Special Rapporteur had called for a fresh approach. The result had been some radical changes in the content of the draft articles, which deserved commendation.

20. Hungary supported the Special Rapporteur's proposal that the question of the form of the draft articles should be deferred. Views were still deeply divided on the distinction between "criminal" and "delictual" responsibility, but almost everyone agreed that State responsibility should be viewed as a unified field and that, therefore, the concept of "State crimes" in the penal sense was as yet hardly recognized: in other words, State responsibility was neither criminal nor delictual but international. Although Hungary sympathized with the Special Rapporteur's efforts to "decriminalize" State responsibility, the Commission had been wise to defer a decision on "International crimes and international delicts" (art. 19). The systematic development of key notions, such as obligations *erga omnes* and peremptory norms (*jus cogens*), and a possible category of the most serious breaches of international obligations would resolve the contradiction created by article 19. That position should be seen as an answer to the question put by the Commission in paragraph 37 (b) of its report. As to whether all conduct of an organ of a State was attributable to that State under article 5, irrespective of the *jure gestionis* or *jure imperii* nature of the conduct, the short answer was yes.

21. His delegation welcomed the shortening of the text of part one of the draft articles, agreeing with Mr. Simma that considerable dead weight had been removed. It thought that article 40 should be regarded as one of the fundamental provisions. As currently drafted it did not offer a satisfactory response to breaches of obligations *erga omnes*, owing to its inconsistency with article 60 of the 1969 Vienna Convention on the Law of Treaties, which provided more restrictive rules. A narrower limitation of the competence of States with regard to invoking *erga omnes* violations would not negatively affect a response by the international community to grave violations of international law: existing procedures, such as Chapter VII of the Charter and the principal humanitarian and human rights instruments, could be used.

22. With regard to the topic of nationality in relation to the succession of States (chap. VII of the report), his delegation noted the preliminary conclusions of the Working Group on the nationality of legal persons and shared its view that the issues involved in the topic were too specific and the practical need for their solution was not evident. It would be better for the Commission and its Special Rapporteur to concentrate on the second reading of the provisionally adopted draft articles on the nationality of natural persons.

23. With regard to the draft guidelines on reservations to treaties (chap. IX.C), his delegation subscribed to the prevailing view that there was no need to alter the reservations regime contained in the three Vienna Conventions, although there was a need to fill some gaps and remove some ambiguities. It generally welcomed the draft guidelines adopted on first reading, but the Commission should not allow itself to be trapped in a lengthy "definitional exercise". In his capacity as the outgoing Chairman of the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, he wished to pay tribute to a number of delegations, especially those of the Nordic countries and Austria, for their contributions to that Committee's work. At its latest session, the Ad Hoc Committee had decided to create a "reservations to treaties observatory". Special attention would be given to questions relating to reservations to treaties, in particular from the human rights perspective, with a view to contributing to the Commission's work, and to ways of assisting States members of the Council of Europe to develop their practice with respect to reservations and interpretative declarations.

24. **Mr. Jayaratnam** (Singapore), speaking on the topic of State responsibility, said that the identification of an injured State pursuant to article 40 was vital in determining the right to claim remedies against the wrongdoing State, including legitimate countermeasures. A State would first have to show that the right alleged to be violated was a primary rule in international law, and that the parties were bound by that primary rule. Where a multinational treaty was concerned, States were obviously aware of the provisions they had committed themselves to when they had ratified or acceded to the treaty. Where customary international law was concerned, States might be bound by a rule, whether or not they specifically consented to it, either on the basis of acquiescence or because it was a norm which created obligations owed to the international community. Two conditions thus existed before a State could rely on customary international law: that State must establish the

requirement of acceptance as a norm of customary international law, and must show a relationship between the violator and the State claiming the status of an injured State that was sufficient to grant standing under article 40. A corollary issue was the difficulty of determining what mechanisms might be applied when particular provisions were violated, since the choice of enforcement or dispute settlement procedures differed between treaty and customary international law. Under article 40, paragraph 2 (e), a State was an injured State where either a multilateral treaty or a rule of customary international law had been violated; it was not clear what happened when an overlap occurred. The general principle seemed to be that, where a multilateral or regional convention had mechanisms for reacting against violations, those mechanisms took priority. The Commission should clarify those issues and should consider the desirability of drafting separate provisions dealing with the two sources of international law rather than combining them.

25. His delegation agreed that the right of States to take countermeasures in response to unlawful acts was permissible under customary international law, but questioned the desirability of providing a legal regime for countermeasures because of the complexity of the issues involved. For example, articles 48 and 50 did not address the key issue of whether the measures taken should be related to the rights infringed; in general, article 50 did not reflect State practice or customary international law. Moreover, the application and impact of economic sanctions as countermeasures was inevitably dependent on the economic and political status of the injured and wrongdoing States; a more powerful State could impose more effective countermeasures than weaker States, especially developing and less developed States, and the impact would generally be far more detrimental to weaker States. The use of countermeasures would thus favour more powerful States and would potentially undermine any system based on equality and justice. The application of countermeasures should not adversely affect the rights of third States: the draft articles might need to address concerns on abuses against and contingencies for innocent third States.

26. His delegation was not convinced that the draft articles should take the form of an international convention, since that might create unnecessarily rigid rules.

27. Turning to the topic of reservations to treaties, he said that the draft guidelines on the definition of reservations and interpretive declarations did not prejudge the question of the permissibility or impermissibility of the reservations. His delegation believed that the regime of the Vienna Conventions had served the international community well and should be maintained; in particular, no distinction should be drawn between human rights treaties and other multilateral treaties. The report of the Special Rapporteur should take into account the fact that State practice in relation to the formulation of reservations to multilateral treaties, including human rights treaties, varied widely. There was little State practice to support the doctrine of severability. The Guide to Practice should also reflect current State practice in that area. He drew attention to the views expressed by States in that connection at the special meeting on reservations to treaties convened by the Asian-African Legal Consultative Committee on 14 April 1998.

28. With regard to the role of human rights treaty monitoring bodies, his delegation considered that it was for States parties to decide on the legality of the reservations formulated with respect to a given instrument, bearing in mind the object and purpose of the treaty. That was obvious from the provisions of articles 19 to 23 of the 1969 and 1986 Vienna Conventions. It was not appropriate for the monitoring bodies to make pronouncements on the nature or scope of a State party's obligations, or the validity of reservations, or to set aside reservations. However, States parties themselves could agree in the treaty itself that monitoring bodies should be given wider competence.

29. *Mr. Enkhsaikhan (Mongolia) resumed the Chair.*

30. **Ms. Efrat-Smilg** (Israel), speaking on the topic of State responsibility, said that her delegation felt that the new draft article 5 proposed by the Special Rapporteur represented an improvement; however, some of the ambiguities had not been resolved, but simply better hidden. One example was the apparent inconsistency between former articles 4 and 5, whereby internationally wrongful acts could not be affected by their characterization as lawful by internal law, on the one hand, but a State organ was a term defined with reference to internal law.

31. With regard to the specific question raised by the Commission in paragraph 35 of its report, she said that article 5 suggested that any conduct of a State organ in its capacity as such was attributable to the State; no distinction was drawn for the purpose of attribution between *acta jure imperii* and *acta jure gestionis*. According to draft article 10, the same principle applied even where such acts were committed by the organ *ultra vires*. Her delegation felt that that was the correct analysis and that the nature of the conduct, if exercised in the capacity of a State organ, should not present an impediment to the attribution of that conduct to the State. It felt that the issues of State responsibility and State immunity must not be confused, and that the distinction between *acta jure imperii* and *acta jure gestionis* operated on the plane of State immunity and not State responsibility.

Thus, while her delegation supported the restrictive approach concerning immunity for *acta jure gestionis*, it felt that that immunity did not imply that States were not responsible for such acts: on the contrary, the starting point for the question of State immunity in those cases was the liability, or at least potential liability, of States for all acts committed by themselves or their organs.

32. As to the second issue raised by the Commission, her delegation felt that part two, chapter II, of the draft as a whole needed improvement, both in form and in substance. Although the basic principle established in article 42 was one of full reparation, both article 42 itself and subsequent articles suggested a change in that principle. Article 42, paragraph 2, could be interpreted as a deviation from the full reparation standard, and opened the way for abuse by wrongdoing States. Her delegation also felt that the specific reference made to negligence and wilful acts or omissions suggested an emphasis on compensation and not on reparation as a whole, and ignored other equally significant factors. If compensation was to be the main remedy resorted to following an internationally wrongful act, article 44 was too brief, particularly when contrasted with the more detailed provisions in articles 45 and 46. The Commission should therefore amplify the guidance regarding compensation, either through codification of customary law, or by reference to the various forms of compensation proposed by the Special Rapporteur in 1989. In accordance with the principle of full reparation, the payment of interest should be the basic and general rule for compensation.

33. Her delegation had received the final version of the Commission's report only recently and hoped that, in future, it would be possible to gain immediate access to the report on the World Wide Web, rather than awaiting the hard copy version.

34. **Mr. Lehmann** (Denmark), speaking on behalf of the Nordic countries, said that they were satisfied with the progress made so far in the second reading of the draft articles on State responsibility. The issues involved were hardly new, and it was therefore surprising that doubts were being expressed about the value of the whole project; it seemed that States were reluctant to have any settlement, in particular a binding one, of responsibility for violating the rules that were established. Delegations must overcome such tendencies and work constructively to promote the rule of law and its implementation in international relations.

35. The Nordic countries believed that the draft articles reflected current practice but appreciated that some changes were needed, in particular in part one of the draft. They therefore supported the Special Rapporteur's efforts to amalgamate some provisions, or delete articles concerning situations which were not covered by the draft, relegating those explanations to the commentaries.

36. As to the specific questions raised by the Special Rapporteur in paragraphs 35 and 36 of the Commission's report, the Nordic countries felt that the distinction between acts *jure gestionis* and *jure imperii* should not be introduced into article 5. Such a distinction was extremely difficult to draw and could considerably restrict the possibility of a State being held responsible for committing an internationally wrongful act. They considered compensation to be, in practice at least, the most relevant element in making reparation for the injury caused, and favoured more detailed provisions on compensation, in particular with regard to the assessment of pecuniary damage, including interest and loss of profits.

37. On the question of the distinction between delicts and crimes, in article 19, the Nordic countries believed that a certain distinction was warranted depending on the seriousness of an internationally wrongful act, whatever terminology was used. A State which was in breach of the peace should incur particularly severe consequences as opposed, for example, to a State which had violated diplomatic privileges and immunities.

38. Speaking as the representative of Denmark, he said that his Government greatly appreciated the international law seminars held each year in Geneva in connection with the annual sessions of the Commission; it had made substantial contributions to the holding of the seminars over the years, and hoped that other Governments would do so too.

The meeting rose at 4.35 p.m.

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Summary record of the 20th meeting
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Chairman: Mr. Enkhsaikhan ..... (Mongolia)
later: Mr. Mochochoko (Vice-Chairman) ..... (Lesotho)
later: Mr. Enkhsaikhan ..... (Mongolia)

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The meeting was called to order at 3.15 p.m.

Agenda item 150: Report of the International Law Commission on the work of its fiftieth session *(continued)* (A/53/10 and Corr.1)

1. **Mr. Win** (Myanmar) said that his Government had repeatedly expressed its support for the work of the International Law Commission since its inception. His country was making every effort to strengthen the legal system that had been in force since its accession to independence 50 years earlier. That was being done not only in order to modernize the existing laws, but to promote the rule of law within the country, especially in those areas that only in recent years had seen a cessation of armed insurgencies and achieved peace and stability. His delegation acknowledged that international law played a crucial role in the preservation of international peace and security. The topics under discussion by the Commission required clearly defined international rules that could prevent unnecessary problems in the international arena. His delegation noted with satisfaction the dissemination of international law publications by the Commission and the holding of the International Law Seminar in Geneva.

2. **Mr. Zarif** (Islamic Republic of Iran), referring to chapter V of the report of the International Law on Commission (A/53/10 and Corr.1), said that the topic of diplomatic protection had major practical significance for contemporary international relations. In view of recent developments in the field, the Commission should continue to discharge the mandate entrusted to it in accordance with its plan of work. His delegation supported the conclusions of the Working Group as contained in paragraph 108 of the report and believed that the Special Rapporteur should proceed with the preparation of his second report, to be entitled "Basis for diplomatic protection".

3. His delegation agreed that the customary law approach should form the basis for the Commission's work on the topic. Nevertheless, the growing number of bilateral investment promotion and protection agreements should not be overlooked. At the same time, the extension of the scope of the topic to extraneous issues should be avoided. The analogy between diplomatic protection and the right of petition was misleading. As explained by the Special Rapporteur, diplomatic protection could be invoked in the case of a dispute between a host State and a foreign national whose rights had been violated and who had suffered injury as a result. Since the foreign national was unable to invoke the remedies provided for under international law, the State of nationality could espouse the individual's claim in international forums. The right of petition, however, entitled an individual to bring a petition directly before a judicial body. The two institutions were thus completely separate and should not be confused.

4. Turning to chapter VI of the report, he said that in the absence of a coherent doctrine encompassing all types of unilateral acts, the Commission's work would constitute the progressive development of international law in that area. The development of rules or guiding principles would help to clarify various aspects of State acts. As far as the scope of the topic was concerned, it was essential to establish a clear framework that could facilitate the Commission's work. His delegation concurred with the Special Rapporteur that it was not necessary for the Commission to examine all types of State acts. His delegation supported the approach adopted by the Commission at its previous session, that of limiting the scope of the topic to unilateral acts of States which generated legal effects. That approach excluded unilateral acts of States linked to a specific legal regime and acts of other subjects of international law, such as international organizations.

5. While his delegation agreed that declarations should form the core of the Special Rapporteur's work, the mandate of the Commission did not preclude the study of other unilateral acts. His delegation had no objections to a study being undertaken of the silence of a State and of estoppel; it should be borne in mind, however, that silence was not a legal term and could not give rise to legal consequences. Consideration of estoppel, however, might be useful to the Commission in developing a fuller view of those types of unilateral acts which unquestionably fell within the scope of the topic. As to the extension of the scope of the topic to unilateral acts of States issued to other subjects of international law, his delegation believed that that did not fall within the Commission's mandate.

6. With regard to chapter VIII of the report, his delegation concurred with the Commission that in the absence of positive comments by States, the Commission's work on the topic should be limited to the nationality of natural persons. It remained open-minded, however, as to the necessity of undertaking further work if Governments which had recently undergone succession provided compelling reasons for doing so.

7. With regard to chapter IV of the report, it was encouraging to note that the Commission had completed the first set of draft articles on prevention in only one year. Concerning the question raised by the Commission in paragraph 32 of the report, while his delegation tended to agree with the Commission that the duty of prevention was

an obligation of conduct, it wished to emphasize that within the framework of State responsibility, the breach of an obligation of conduct could still produce consequences.

8. As to the appropriate type of dispute settlement procedure, that depended on the final form which the draft articles should take; in his delegation's view, a model law was the most suitable format. In addition to a fact-finding Commission, negotiations and recourse to a conciliation commission appeared to be appropriate mechanisms.

9. Turning to chapter V of the report, he said his delegation shared the Commission's general view that the Vienna Conventions on the law of treaties had established a practical reservations regime applicable to all types of treaties. By recognizing the right of States to reserve their positions while signing, ratifying or acceding to multilateral treaties, the Vienna regime had facilitated the accession of a large number of States to such treaties. His delegation therefore concurred with the Commission's decision to focus on remedying ambiguities and clarifying obscurities. In that respect, the draft guidelines proposed by the Special Rapporteur on the definition of reservations and interpretative declarations were a step in the right direction.

10. With regard to the question raised by the Special Rapporteur in paragraph 41 of the report, his delegation believed that unilateral statements by which a State purported to increase its commitments to a given treaty should not be considered as reservations. Such statements were merely proposals by a State for amending a treaty, and could become binding only after their acceptance by other parties in accordance with the provisions of the treaty.

11. **Mr. Momtaz** (Islamic Republic of Iran), referring to chapter VII of the report, noted that with few exceptions, most developing countries had not yet responded to the Commission's invitation to submit written observations on the draft articles on State responsibility adopted on first reading. Experience had shown that those countries generally preferred to state their views on draft articles prepared by the Commission in the framework of the Sixth Committee. The Committee should therefore attach as much importance to statements expressed orally as to written observations. He noted with satisfaction the willingness of the Special Rapporteur to take into account the views expressed by States in debates.

12. With regard to the distinction between "criminal" and "delictual" responsibility, there was currently a general agreement, reflected in the decision of the International Court of Justice in the *Barcelona Traction* case, as to the existence of international obligations towards the international community as a whole, or *erga omnes* obligations. Since breaches of such obligations undermined the very basis of the international community, they unquestionably required a specific regime of responsibility different from the regime envisaged for violations of other primary rules of international law. The qualitative difference between the two categories of internationally wrongful acts was the source of the distinction in draft article 19 between delicts and State crimes. The international criminalization of "exceptionally serious wrongful acts" was thus intended to strengthen the notion of international public order and to preserve the highest values of humanity. The distinction also took into account the evolution of international society, which was now based on solidarity between States while at the same time reflecting their wish to respond collectively to a violation of society's common values. To abandon such a hierarchy of breaches of international obligations, as had been proposed, would be to disregard that need and to return to the traditional bilateralist approach to the law of international responsibility, which had been concerned solely with repairing the damage suffered by a State as a result of a breach of a primary rule of international law. Since the main argument of those opposed to the distinction in draft article 19 was based on the penal connotations of the concept of an international State crime, his delegation would welcome all efforts aimed at reaching agreement on a new term. It had been suggested that the concept should be defined, respectively, as a violation of a *jus cogens* norm, an exceptionally serious internationally wrongful act or a breach of an obligation that was essential for the protection of the fundamental interests of the international community as a whole. In the final analysis, all those proposals appeared to be more or less consistent with the *sui generis* nature of State responsibility, which was neither civil nor criminal, but international. Whichever the term was selected, it did not seem necessary to provide a precise definition of a wrongful act.

13. His delegation deemed it essential, however, to clarify the legal consequences arising from the violation of the two categories of rules and to determine the degrees of responsibility in each case. The distinction had no meaning unless there were real differences between the consequences. Despite the laudable efforts made so far by the various special rapporteurs, it must be acknowledged that a more detailed analysis was needed. That was the conclusion reached by the new Special Rapporteur, who had rightly pointed out that in the case of a violation of a fundamental norm, pecuniary compensation would not suffice. That was one of the issues which the Commission must address during the second reading of the draft articles.

14. Other related questions also warranted further consideration. For instance, an objective determination of the existence of a breach of a fundamental norm should not be left to the discretion of the State which claimed to be injured. His delegation continued to believe that the International Court of Justice was the body which offered the best guarantee of impartiality and which was capable of taking a fully informed decision on the existence of such a breach. Only afterwards did the question of the international community's response arise. The current draft treated each member of the international community as an injured State, giving it the right to respond, including through the adoption of countermeasures, which, it must be admitted, posed a particularly high risk of abuse. In his delegation's view, the right of response should be given only to States that were directly affected. It had been suggested that a distinction should be made among States based on their "proximity" to the breach; the Commission should consider that question and propose objective criteria.

15. At the current stage of international relations characterized by the lack of an effective, centralized system of coercion, it was inconceivable that an injured State should be prevented from taking countermeasures. On the other hand, in order to prevent abuses, it would be prudent for the Commission not only to clarify the rules of customary international law, but also to develop clear rules limiting the circumstances under which States could resort to countermeasures. If the parties in conflict were subject to a compulsory dispute settlement procedure, that would obviate the need for countermeasures. Since that did not always seem to be the case, the inclusion in the draft articles of an obligation on the part of the injured State to negotiate prior to taking countermeasures appeared to be appropriate. The obligation to negotiate in good faith, and to conclude negotiations within the stipulated time-frame appeared to provide sufficient guarantees to the injured State that its position would not be jeopardized. In the meantime, the injured State should confine itself to taking such interim measures as seemed necessary to protect its rights.

16. The failure of negotiations or of any other peaceful dispute settlement procedure did not, however, entitle the injured State to resort to countermeasures as it saw fit. The interests of the international community required that certain categories of countermeasures be prohibited. In that context, the draft articles prohibited recourse to extreme measures of coercion aimed at undermining the territorial integrity and political independence of the wrongdoing State. Since the vagueness of the formula used did not make it possible to determine what types of measures fell under such a prohibition, the Commission must examine the issue further with reference to the recent practice of States. The application of the principle of proportionality, which was recognized by doctrine and jurisprudence, was a regulatory element, especially in the case of bilateral disputes. The question also rose as to whether the objectives underlying the adoption of countermeasures should be taken into consideration in assessing the degree of proportionality. To that end, the Commission should consider the measures adopted in recent years against the so-called "pariah" States which were guilty of violating the fundamental norms of international law.

17. **Mr. Chimimba** (Malawi) said that the streamlining of the draft articles on State responsibility had led to many improvements in the text. His delegation agreed in particular that no distinction should be made between *acta jure gestionis* and *acta jure imperii* for the purposes of article 5. There was no doubt that internal law would be relevant in certain circumstances, but not always decisive, with regard to the determination of the status of an organ of the State and the attribution to the State of the conduct of its entities. However, it might be better to refer to internal law in the commentary rather than in the body of the draft articles. The broadening of the scope of article 7 by means of an explanation in the commentary did indeed reflect the realities of the contemporary world with respect to the delegation of governmental authority.

18. Turning to article 19, he said that in their joint statement in the Committee at the fifty-first session the countries of the Southern African Development Community had indicated their preference for retaining the distinction between international delicts and international crimes. His delegation still held that position although it was mindful that others disagreed. It might be useful to explore alternative language which would avoid the criminal implications. The second alternative offered by the Special Rapporteur, combined with aspects of the fifth alternative – decriminalizing State responsibility – offered a realistic solution. The second option might pose dilemmas, but the distinction was an important one and ought to be made.

19. His delegation noted that the Commission would continue to take a "objective responsibility approach", and positive law certainly drew distinctions between certain rights and obligations. On the other hand, such distinctions did not always have to entail automatic distinctions in the consequences, particularly with regard to reparation. It would be wrong to underestimate the deterrent effect of the distinction which the Commission was seeking. Since the idea of drawing parallels between delicts and crimes seemed to have had its origins in rules of *jus cogens* and obligations *erga omnes*, a satisfactory solution might lie therein. The

Commission should continue its efforts to fill the gaps between the various options.

20. His delegation was glad that the Commission had held a segment of its session in New York, thus enhancing the possibility of contacts between its members and representatives of Governments. The practice should become a regular one.

21. *Mr. Mochochoko (Lesotho), Vice-Chairman, took the Chair.*

22. **Mr. Alabrune** (France) said that France had expressed serious reservations concerning the draft articles on State responsibility because they addressed primary rules. The Commission should in fact limit its study to the codification of secondary rules. There was nothing to prevent the Commission stating as a prior condition to its work the existence of a wrongful act by a State, but the study should not deal with the content of the international obligation which had been breached. France had repeatedly stated that the existence of harm was an indispensable element for triggering State responsibility and had always criticized the idea that a failure to fulfil obligations was sufficient. It regretted that the Special Rapporteur had recommended no change in that respect in draft article 1 and hoped that his re-examination of the relationship between article 1 and article 40, on the "injured State", would allow the Commission to posit the principle that harm must exist if State responsibility was to be entailed.

23. His delegation had also frequently criticized the concept of "international crime" as defined in draft article 19 and the distinction between crimes and delicts. Some wrongful acts were of course more serious that others, but the Commission's distinction was impracticable. Moreover, it drew very few consequences from the distinction. His delegation looked forward to the conclusions of the working group to be set up on article 19, and was pleased that the Commission stressed the importance of taking the views of Governments into account during the second reading of the draft articles.

24. Some of the drafting changes in chapter II proposed by the Special Rapporteur went in the right direction but did not take full account of the written comments submitted by France.

25. The term "injured State" in article 40 was ambiguous. There again, the emphasis must be on the notion of "harm". It was a good thing that the Commission was to re-examine the definition of "injured State", but it would be wrong to do so, as it intended, on the basis of the notion of *jus cogens*.

26. The provisions on countermeasures had no place in draft articles on State responsibility, which should include only matters connected with that topic. A countermeasures regime might warrant a specific study by the Commission, but not as part of the law of responsibility. The provisions on dispute settlement seemed equally misplaced. The effect of Part Three was to establish the jurisdictional settlement of all disputes, but there was no reason to single out disputes connected with State responsibility by applying an ad hoc settlement mechanism to them. There were rarely any disputes about responsibility alone, but rather substantive disputes which had consequences for responsibility. It would be better to rely on general international law, and one solution might be to give Part Three the form of an optional protocol, if it could not be deleted. The Special Rapporteur stated in his report that he had noted the concerns expressed by some Governments about the inclusion of detailed provisions on countermeasures and on dispute settlement. It was to be hoped that he would take those concerns into account when he re-examined the two questions.

27. The Committee must give some thought to its relations with the Commission, with a view to offering more guidance and establishing a true dialogue between the two bodies. Further topics must be proposed, such as the legal consequences of the decisions of international organizations. The Commission might usefully make a separate study of countermeasures regimes instead of dealing with the topic under State responsibility and also, as already suggested, reflect on the concept of legal person under international law.

28. **Mr. Da Gama** (Portugal) said that the draft articles on prevention of transboundary damage from hazardous activities correctly reflected the basic principles of international environmental law, although the Commission had taken a cautious approach by leaving aside for the moment the fundamental question of compensation for harm caused. Portugal had always welcomed legal solutions involving commitments to preventive action, but it was essential to establish the obligation to pay compensation for harm. The future legal instrument should therefore cover both prevention and compensation. Compensation of innocent victims must in fact be a guiding principle, but Portugal remained flexible on the shaping of the theoretical framework of such a principle. It shared the regret of other delegations at the deletion of article 1 (b), a move limiting the text to hazardous activities: activities not normally entailing risk might also cause harm, and in any event there was currently no clear definition of hazardous activity.

29. Portugal endorsed the need for reinforcement of the dispute-settlement mechanisms and welcomed the provision on a fact-finding commission in article 17, paragraph 2.

30. Portugal continued to believe that diplomatic protection should include the protection claimed for their agents by international organizations, because of both the existing legal precedents and the basic fairness of such protection. The protection should also cover persons located in territories under a State's administration. There was a clear need for the Commission to focus on concrete draft articles. Diplomatic protection must be regarded as a sovereign prerogative of the State of nationality, a prerogative entailing discretionary State powers. For all practical purposes the persons concerned should be considered as beneficiaries of international law. As to the relationship between human rights and diplomatic protection, the two institutions should not be specifically linked in any draft articles on the topic.

31. His delegation reserved its position on the topic of unilateral acts of States pending the more substantive report promised by the Special Rapporteur. It also wished to defer its position on whether the scope of the topic should be limited to declarations, as proposed by the Special Rapporteur, or should encompass other unilateral expressions of the will of the State. As to whether unilateral acts should include acts affecting subjects of international law other than States, or limited to acts affecting other States, Portugal believed that at least international organizations should be covered.

32. On the topic of State responsibility, Portugal endorsed the position set forth by the representative of Denmark on behalf of the Nordic countries with regard to the distinction between delicts and crimes, compensation, and the distinction between *acta jure gestionis* and *acta jure imperii*. There was indeed a distinction in international law between minor offences and internationally wrongful acts resulting from a breach by a State of an international obligation. The topic clearly revealed the obstacles to the promotion of the rule of law in international relations. Portugal therefore looked forward to the three further reports promised by the Special Rapporteur.

33. Turning to the topic of nationality in relation to the succession of States, he said that his delegation supported the approach of giving priority to questions concerning natural persons over questions concerning legal persons. The free choice of nationality was of crucial importance, and the principle of the right of option should be applied to the maximum extent possible. That right was also a powerful tool for avoiding "grey areas" of competing jurisdictions.

34. His delegation also welcomed the draft articles on non-retroactivity of legislation, family unity, non-discrimination, prohibition of arbitrary decisions, and the obligation of States to prevent statelessness. The provisions on the presumption of nationality and consent were also acceptable. However, an additional effort should be made to clarify concepts such as "appropriate legal connection" and "reasonable time-limit for the exercise of the rights".

35. Portugal also believed that the draft articles should address situations of decolonization and specify that the regime applied *mutatis mutandis* to such situations. With regard to the nationality of legal persons, the Commission must begin by defining what a legal person was and then address the question of how to assess the nationality of such persons.

36. His delegation attached great importance to the long-overdue work on the topic of reservations to treaties. It was often unclear in practice which reservations were acceptable and what effect objections had on them. Since no specific consequences were attached to objections, the result was often that each State became the sole judge of the compatibility of reservations with the purpose of the treaty. Therefore, while agreeing that the Vienna regime must be preserved, Portugal believed that it was fundamentally incomplete. That was a particularly important issue in the case of rules of *jus cogens*, since reservations would clash with a pre-existing rule which the treaty had embodied. It was also wrong to condone the practices of States which knowingly made reservations against the core of a treaty. Such practices might turn universality into a hollow word. It might indeed be useful for the Commission to consider further an ad hoc reservations regime for human rights treaties.

37. **Mr. Pham Truong Giang** (Viet Nam) said that his delegation attached great importance to the question of international liability for injurious consequences arising out of acts not prohibited by international law. The regulation of those activities should be in accordance with basic principles of international law, such as sovereignty of States, sovereign equality and settlement of disputes by peaceful means. The scope of the articles must be clarified and carefully formulated. Article 1 should be reconsidered and further elaborated.

38. The term "significant" transboundary harm in article 2 (a) should be clarified. The criteria of measurement and assessment of "harm", "significant" harm or "probability" of harm should be further elaborated. His delegation agreed that States should take all appropriate measures to prevent

or minimize the risk of causing significant harm to others. Nevertheless, the issue remained as to how to deal with harm of a lesser degree that was not considered "significant". Would measures only be taken in cases of significant harm, in accordance with article 3? The best solution, of course, was not to cause any harm to others; however, if harm was unavoidable and was actually caused, the State of origin should bear the obligation. All those issues should be considered further.

39. Although article 7 provided that prior authorization of a State was required for activities within the scope of the draft articles, the matter of whether the prior authorization would be granted by the State of origin or the State likely to be affected was not yet clear. The question of prior authorization might relate to the issue of prior consultation among the States concerned, especially with the State that was likely to be affected by the activities that had the potential to cause harm.

40. Further discussion was also needed on article 10, which dealt with the principle of prior notification and information. With regard to the determination of the burden of liability and its level, article 12, particularly paragraphs (b), (d) and (e), should be redrafted in order to clarify the issues involved.

41. **Mr. Lavalle-Valdés** (Guatemala), speaking on the topic of reservations to treaties, said that the Commission should discuss the issues raised by reservations which modified rather than excluded the application of a particular provision of the treaty to which the reservation was being made. The question might be raised as to whether it would be lawful for a State party to a multilateral treaty to make a reservation that would have the effect of replacing one provision of the treaty by another radically different one, thus completely distorting the text under the guise of modifying the provision that was being replaced. Even though such a reservation might not have any effect as an amendment, it would still have other legal effects. It should, in fact, be considered a statement of exclusion, inasmuch as it was aimed at excluding the application of the relevant provision of the treaty to the State making the reservation. If the exclusion was compatible with the purposes of the treaty, it would be admissible. If the State making the reservation also assumed an additional obligation not imposed by the treaty, the reservation would be an extensive one as well as an exclusion.

42. His delegation considered that an extensive reservation was not really a reservation but was, rather, a unilateral act of a State. Consequently, the effects of such a reservation would not be governed by the law of treaties. A so-called reservation that increased the obligations of the other parties to a treaty was not a true reservation either. In fact, a unilateral statement made by a State without any basis in an external rule or circumstance could not be used to impose obligations on third States.

43. With regard to interpretative declarations, he said that the interpretation given to the treaty must at least be a plausible one. If it was not plausible, then the instrument was actually an amendment disguised as an interpretative declaration. With regard to the distinction between interpretative declarations and reservations, there was a third aspect to be considered in addition to the two mentioned in paragraph 517 of the Commission's report, namely that unlike reservations, interpretative declarations – provided they were plausible – did not have any legal effect.

44. As a corollary to that, it should be pointed out that nothing stood in the way of a State party to a multilateral treaty making an interpretative declaration by means of a communication to the States parties, without going through the depositary of the treaty. That procedure might not apply in the case of a conditional interpretative declaration, an interesting possibility mentioned in paragraph 512 of the report.

45. Lastly, he said that in its future work on reservations, the Commission should consider the matter of the obligations of depositaries. Such a discussion would be particularly useful to depositaries who, unlike Governments or organizations, performed their duties as depositary on a small scale. The experience of the Secretary-General of the United Nations could be very useful in that regard. His delegation understood that the guidelines followed by the Secretary-General in connection with his duties as the depositary of international treaties existed only in French; it would be very helpful if they could be made available in all the official languages of the Organization.

46. **Mr. Farrell** (Ireland) said that his delegation welcomed the continuing efforts of the Commission to develop draft articles on the subject of State responsibility. While there was some merit in making a distinction between wrongful international acts in accordance with their degree of gravity, his Government shared the view of those delegations which saw criminal responsibility as first and foremost a matter of individual moral responsibility. The best way forward in international law was to try to get universal agreement that particularly heinous behaviour on the part of individuals should be criminalized and to establish the necessary procedures and institutions at the international level to ensure that human beings were called to account for such behaviour. The current effort to establish

the International Criminal Court was a move in that direction.

47. His delegation welcomed the thorough consideration given by the Commission to the topic of criminal responsibility and, in particular, the acknowledgement by the Commission of the importance of taking into account the views of Governments in considering that and other aspects of the draft articles.

48. His delegation appreciated the approach taken by the Commission in chapter III of the report, in which it itemized those aspects of its work on which it would welcome comments by Governments.

49. He welcomed the substantial progress made by the Commission in adopting on first reading a set of draft articles with commentaries on the prevention of transboundary damage from hazardous activities. His Government would examine the draft articles in due course, having particular regard to the points raised in paragraphs 31 to 34 of the report. With regard to the Committee's decision to recommend a regime on prevention, as distinct from a regime of liability, his delegation acknowledged the importance of prevention but considered it necessary also to consider the question of liability in situations where harm did occur, so as to ensure that the innocent victim was not left to bear the damage alone. He urged the Commission to continue to consider the liability aspect of the topic.

50. On the topic of reservations to treaties, his delegation had noted with particular interest the comments of those delegations that had drawn attention to the issue of reservations insofar as they concerned human rights treaties.

51. With regard to chapter X and, in particular, the future work of the Commission, his delegation agreed that the Commission should not restrict itself to traditional topics and that it should also consider topics that reflected new developments in international law and pressing concerns of the international community as a whole. He had noted with interest the topics referred to in paragraph 554 of the report, and in particular, the reference to topics such as human rights, environment and shared natural resources, as worthy of the Commission's attention in future years. With regard to paragraph 555, his delegation wished to record its appreciation of the contribution made by the Commission to the preparation of the original draft of the Statute of the International Criminal Court.

52. His delegation was pleased to have supported the trust fund for the international seminar for young lawyers, held in Geneva in May 1998, and noted with satisfaction the good geographical distribution of participants, particularly from developing countries.

53. **Mr. Sotirov** (Bulgaria) said that his remarks would focus on the topic of State responsibility and, more specifically, on the distinction between "international crimes" and "delicts as internationally wrongful acts", as set forth in draft article 19, paragraph 4. There was a qualitative distinction in international law between the most serious internationally wrongful acts, which affected the interests of the international community as a whole, and other wrongful acts. Therefore, a clear distinction should be drawn between more and less serious wrongful acts. The distinction between the two categories of violations was to be found in existing law and State practice.

54. While his delegation supported the retention of article 19, it considered that the definition of "international crimes" in paragraphs 2 and 3 of that article needed further clarification. The category of crimes might be defined in other ways, for example, by reference to the existence of some specific system for their investigation and enforcement or to their substantive consequences.

55. Part Two, dealing with the consequences of international crimes, did not specify the distinctive and exclusive consequences of such crimes. Nor did it lay down any special procedure for determining authoritatively whether a crime had been committed, or what its consequences should be. Thus, the current draft articles failed to develop the distinction between crimes and delicts adequately in terms of the procedural implications or consequences of crimes. There was a marked contrast between the gravity of an international crime, as expressed in draft article 19, on the one hand, and the rather limited consequences of the international crime mentioned in articles 51 to 53. There was a further contrast between the strong procedural guarantee associated with countermeasures under draft article 48 and Part Three, and the complete absence of procedural guarantee associated with international crimes.

56. Once the existence of the category of international crimes was accepted, the consequences of the distinction must be dealt with in draft articles, which should set forth as precisely as possible the different treatment and different consequences with respect to different violations.

57. Regarding the distinction between "criminal" and "delictual" State responsibility, his delegation was not in favour of developing a regime of criminal responsibility of the State and "penalizing" that responsibility. It was important to include the concept of the distinction between crimes and delicts in the draft articles. At the same time, the acceptance of that distinction did not necessarily lead to the

establishment of two different types of State responsibility. His delegation considered that the law of State responsibility was neither civil nor criminal, but purely and simply international.

58. **Mr. Kerma** (Algeria) said that the Commission's work on nationality of natural persons in relation to succession of States was particularly timely, given the profound political changes that had taken place in recent years and the appearance of new subjects of international law. The draft articles on the topic should be helpful as States sought solutions to the often complex situations they had to face. Some of the rules reaffirmed in the draft articles were particularly relevant, including the provisions on statelessness and family unity. Other concepts embodied in the draft articles, including those of dual nationality and multiple nationality, had not yet been universally accepted. In that regard, the Commission should adopt a pragmatic approach in order to avoid potential disputes between States.

59. On the question of the nationality of legal persons, it seemed unlikely that the Commission would be able any time soon to draft rules that would be practical and immediately applicable. The nationality of legal persons was a much more complex issue than that of natural persons. The experience of States having had a recent experience with succession would undoubtedly make a useful contribution to the Commission's work. The decision to pursue consideration of the matter would be made in the light of the comments which States submitted to the Commission, particularly concerning its future approach.

60. The major difficulty concerning the controversial subject of reservations to treaties was that the 1969 Vienna Convention on the Law of Treaties did not cover all aspects of the matter. Nevertheless, he shared the Commission's view that the reservations regime pursuant to that Convention was flexible enough to maintain a satisfactory balance between the goal of maintaining the integrity of a treaty text and the need for universality.

61. Interpretation of the objectives of the monitoring bodies established under certain human rights treaties was particularly problematic. The sole objective of such bodies was to ensure application of the treaty in question and they could not assume other powers, such as competence to evaluate the permissibility of reservations, unless explicitly mandated to do so under the treaty in question, to which they owed their existence in the first place.

62. His delegation would comment in due course on the complicated subject of the definition and formulation of reservations, as well as on the draft guidelines on reservations contained in the report. The Guide to Practice reflected the current trend followed by States, particularly concerning reservations having territorial scope and reservations formulated jointly. He agreed with the Special Rapporteur that statements designed to increase the obligations of their author could not constitute a reservation. The conclusions of the Special Rapporteur concerning the definition of reservations provided food for thought with a view to clarifying and finalizing the definition. He looked forward to seeing the Commission's final conclusions concerning the distinction between reservations and interpretative declarations.

63. In view of its importance to the progressive development of international law, the complex subject of international liability for injurious consequences arising out of acts not prohibited by international law demanded the sustained attention of the Commission. Pending the Commission's final decision on the matter, however, States should exercise all precautions to prevent possible injurious consequences of hazardous activities. He welcomed the consideration given to the transboundary implications of certain economic activities for the environment and noted that the draft articles reflected the basic principles of international environmental law. He also supported the controversial view that the principles of international law created obligations for States whose activities were harmful to the environment of other States. The compensation payable for damages, however, should vary according to the economic and social development of the country responsible, in which case particular attention should be devoted to the specific situation of the developing countries, which were the most vulnerable in that respect.

64. He similarly supported many of the Commission's recommendations, contained in the important final chapter of the report, that were aimed at improving its efficiency. Without the full cooperation of the Sixth Committee and Governments, however, the Commission would be unable to fulfil its mandate satisfactorily. In conclusion, he expressed approval of the subjects identified by the Commission for inclusion in its long-term programme of work and reiterated his strong support for the Commission in its determined pursuit of the work on its agenda.

65. *Mr. Enkhsaikhan (Mongolia) resumed the Chair.*

66. **Mr. Pfirter** (Observer for Switzerland), commenting on the draft guidelines on reservations to treaties, expressed approval of the composite method adopted by the Commission in its efforts to arrive at a comprehensive definition of reservations that would reflect the pertinent elements of the definitions contained in the three Vienna Conventions of 1969, 1978 and 1986. He queried, however,

the precision of the term "purports to exclude or to modify the legal effect" contained in the resulting "Vienna definition" set out in draft guideline 1.1. It would be more precise to define reservations as purporting to "exclude or to limit the legal effect" of certain provisions, particularly since statements designed to increase the obligations of their author were not reservations in the sense of the Vienna definition and since all reservations were aimed at wholly or partially neutralizing certain provisions of a given treaty. Further consideration should be given to draft guideline 1.1.1, which was flawed in that a reservation should not relate to the way in which its author intended to apply a treaty. Furthermore, the word "reservation" at the beginning of the draft guideline failed to alleviate the concern which he shared with other delegations that confusion might arise concerning across-the-board reservations and straightforward interpretative declarations.

67. He regretted that the composite method had not been used in the formulation of draft guideline 1.1.2, according to which the means of expressing consent to be bound by a treaty excluded the declaration of succession to a treaty provided for under the 1978 Vienna Convention. Such a declaration was a means of expressing that consent and should therefore be regarded as an instance in which reservations could be formulated. Accordingly, the draft guideline should involve a general renvoi to the 1978 Vienna Convention on the understanding that clarifications would be made in the part of the Guide to Practice relating to the succession of States in relation to reservations to treaties.

68. It was surprising that draft guideline 1.1.3 did not include the terms "modify", "limit" or any of their derivatives, as the possibility could not be entirely excluded that a State responsible for the international relations of a territory might, at the time of signing a treaty or expressing its consent to be bound by it, formulate a declaration aimed at limiting the application of the treaty or the legal effect of some of its provisions in regard to that territory. The slight imbalance in the second part of the draft guideline could be redressed by adding the words "or some of its provisions" after the words "that treaty".

69. Draft guideline 1.1.7 concerning reservations formulated jointly provided reasonable provision for future situations which were likely to arise, while the additional draft guideline provisionally adopted by the Commission appeared to pose no problems in that it stated the obvious.

70. Draft guideline 1.1.6 adopted by the Drafting Committee was not altogether essential, as it repeated a component of the definition of reservations contained in draft guideline 1.1. In the context of draft guideline 1.1.5, however, it would help to clarify the concept of reservations. In connection with the latter draft guideline, he considered that a statement designed to increase the obligations of its author was a unilateral commitment that should not be classed as a reservation.

71. **Mr. Mikulka** (Special Rapporteur on nationality in relation to succession of States) said he was pleased to report that several Governments had submitted their written comments on the draft articles on nationality of natural persons in relation to the succession of States before the deadline of the end of October 1998. Notwithstanding the comments made on the topic during the current debate, he hoped that still more written comments would be received and that the Commission would complete its second reading of the draft articles in the spring of 1999.

72. Having reviewed the steps taken thus far in connection with the second part of the topic, namely the question of the nationality of legal persons in relation to the succession of States, he said that he and the Commission would jointly analyse the comments received on the options proposed by the Commission concerning the possible orientation to be given to its work on that question, if indeed the Commission were invited to consider it. It was clear, however, that the question elicited little enthusiasm and that there was insufficient support to justify immediate consideration of it. One solution would be to separate the two parts altogether, complete work on the first part and refer the second part to the Working Group on future topics, in which context the Commission could evaluate the framework for the question and the extent of its usefulness or urgency compared to the other new topics proposed. He emphasized, however, that his remarks were made without prejudice to the position of the Commission itself, to which he would faithfully transmit at its next session all further views which he received on the subject.

73. **Mr. Pellet** (Special Rapporteur on reservations to treaties) said that the Committee's decision to invite all the Special Rapporteurs of the Commission to address it would facilitate dialogue, although he hoped that that interchange could be made even more effective. The Committee had a right to expect the Commission to meet the needs of Member States but, in order for it to do so, States must provide clearer and more specific guidance than was currently the case. In response to repeated requests from the Committee, the Commission had modified its methods of work. The Committee, for its part, must consider ways of improving its consideration of the Commission's annual report.

74. Turning to the topic of reservations to treaties, he observed that most delegations had supported the

Commission's decision not to depart from the definition of reservations contained in the Vienna Conventions of 1969, 1978 and 1986. While he understood why a few delegations had suggested that the Commission should have taken the opportunity to modify the definition provided in those Conventions, he did not agree, since such a course of action would have created confusion, not only with respect to draft guideline 1.1 (definition of reservations) but throughout the draft guidelines, the purpose of which was to analyse reservations to treaties in light of both the Vienna Conventions and subsequent practice.

75. The problem had been to determine whether the word "modify", which appeared in the definition of reservations given in all the Vienna Conventions, could be interpreted to authorize not only statements intended to limit a State's obligations under a treaty, but also those intended to increase its rights. Many speakers had supported his own view that unilateral statements by which a State purported to increase its rights did not constitute reservations. However, the Commission had not yet found an appropriate way of expressing in a guideline a concept which appeared simple but was in fact complex because, in a sense, a State could be considered to have increased its own rights by making any reservation which limited its responsibilities under a treaty. He was convinced that the Commission would find appropriate wording for that concept during the coming year, taking into account the comments of delegations. Some delegations had suggested that the Commission should simply avoid raising the question in the draft guidelines because of its complexity and theoretical nature. However, the very purpose of the guidelines was to meet the needs of States in cases which, while unusual, did in fact occur.

76. A few delegations had suggested that the attempt to define reservations was not a practical matter and that the Commission should proceed directly to deal with the validity of reservations and States' objections thereto. However, in his opinion it would not be possible to implement the guidelines without some means of determining whether a given unilateral statement did, in fact, constitute a reservation, without prejudice to the question of its validity. In that regard, there appeared to be support for his decision to deal simultaneously with reservations and interpretive declarations, a procedure which would make his own task more difficult but would simplify that of the end users.

77. Turning to issues other than the definition of reservations, he said that one delegation had opposed the use of the word "*directive*" as a translation of the English "guidelines" in the title of the draft. However, it was important to bear in mind that the draft articles were intended to form part of a guide and were, therefore, clearly not compulsory in nature. Moreover, the words "*lignes directrices*", proposed by the delegation in question, had little meaning in French.

78. While most delegations had approved of the wording of draft guideline 1.1.1, several had agreed with the Commission members who had considered that the text lent itself to confusion with interpretive declarations. The Commission would reconsider that article in light of those comments. However, he was less convinced by the delegation which had suggested that the draft guidelines should follow the Vienna Conventions in restricting the definition of reservations to unilateral declarations concerning specific provisions of treaties, a position which was not borne out by State practice.

79. A few delegations had noted that draft guideline 1.1.2 did not state that reservations could be formulated at the time of State succession. He wondered whether it would be better to consider amending that article or whether the matter should be dealt with in the context of the Commission's treatment of reservations in the context of State succession.

80. On the other hand, he saw no reason to incorporate mention of State succession into draft guideline 1.1.3 or to limit that guideline to colonial situations. One delegation had stated its intention to transmit its comments on draft guideline 1.1.3 to the Special Rapporteur at a later date; in that regard, he considered it appropriate for delegations or international organizations to convey to the special rapporteurs their positions on any aspect of the draft, whether officially or informally.

81. The general agreement on draft guideline 1.1.5 was encouraging since it demonstrated that States were not necessarily opposed to proposals involving the progressive development of international law, provided that such proposals were reasonable and intended to prevent problems which had not yet arisen but which might do so in the future.

82. Several delegations had stressed the need for an objective mechanism of dispute settlement in matters related to reservations. The Commission had not dealt with that problem but would consider doing so, although it might be argued that such a mechanism had no place in a guide and might better be handled through a protocol.

83. Various delegations had reiterated their positions concerning the preliminary conclusions which the Commission had adopted in 1997. He did not plan to reconsider those conclusions until the majority of the guidelines had been adopted and comments had been received from Member States and human rights organizations.

84. The fact that, despite its length, his third report had not dealt with a number of complex problems showed both the difficulty of the topic and its importance to the Commission and to States parties. In his next report, he planned to deal with procedures for the formulation of reservations and, if time allowed, with the central question of the validity of reservations. Lastly, while he was pleased that the Commission's work had led to useful discussion in other forums such as the Council of Europe and the Asian-African Legal Consultative Committee, the silence of such a large number of delegations to the Committee was less than encouraging.

The meeting rose at 6.05 p.m.

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Chairman: Mr. Enkhsaikhan ..... (Mongolia)

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Agenda item 150: Report of the International Law Commission on the work of its fiftieth session (*continued*)

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98-82153 (E)

The meeting was called to order at 10.15 a.m.

Agenda item 150: Report of the International Law Commission on the work of its fiftieth session (*continued*) (A/53/10 and Corr.1)

1. **Ms. Škrk** (Slovenia) said that the distinction between State responsibility for international crimes and international delicts was a core issue which the International Law Commission must resolve. The concept of State crimes, including the legality of the use of force in cases of aggression, was one of the most fundamental questions of international law. The category of international State crimes as wrongful acts with legal consequences beyond those of international delicts should be retained in the Commission's future text on State responsibility. Failure to do so would amount to denial of reality in contemporary international relations and would impoverish the process of codification and the progressive development of international law on State responsibility.

2. International crimes fell under international law or State responsibility; therefore, any comparison with the criminal responsibility of natural or legal persons under internal law could be misleading. State responsibility for international crimes should not involve any criminal responsibility; however, because the consequences of State crimes were far more serious than those of international delicts, the Commission should establish separate consequences for those two acts. The objection that international State crimes were not terminologically distinct from international crimes committed by natural persons was unconvincing since the same objection could be raised in the case of international delicts on the grounds that in many internal legal systems, the term "delict" was used to denote a criminal act committed by an individual. International crimes, as envisaged by the Commission, entailed a violation of obligations *erga omnes* that were in the interests of the international community as a whole. Some international crimes, such as aggression or genocide, could also be characterized as breaches of *jus cogens* norms of international law. While her delegation was not opposed to substitution of the term "exceptionally serious wrongful acts" for that of international crimes, it believed that, for practical reasons, the latter concept should be retained. If so, the Commission should reexamine that concept in the light of new developments in international law concerning grave and massive violations of human rights that entailed the responsibility of States.

3. In 1997, her delegation had presented its views to the Committee on the draft articles on the nationality of natural persons in relation to the succession of States and had agreed with the Special Rapporteur that, in the case of the dissolution of a State, the principle of continuity of the secondary nationality, which was the one attributed to an individual by the former federal unit, should prevail over the principle of permanent residency as a criterion for the acquisition of the nationality of a successor State. That principle should apply where the predecessor State was a federation and where, along with nationality within the meaning of international law, the power to grant internal nationality was vested in the federal unit; that had been the consistent practice of successor States emerging from the former Czech and Slovak Federal Republic and the former Socialist Federal Republic of Yugoslavia.

4. Her Government had always maintained that the nationality of legal persons in relation to the succession of States was an important matter; some treaty practice and jurisprudence in that respect originated from treaties concluded after the First World War and should therefore be updated. It would be useful for the Commission to prepare an instrument, perhaps in the form of a declaration, that would establish the basic principles applicable to legal persons not directly linked to States or State entities. The primary issue was to determine how a successor State, in respect of its nationality, treated legal entities within its territory or under its jurisdiction or control that possessed the nationality of the predecessor State in the absence of agreement among the States concerned. That instrument might include a clause urging the States in question to negotiate and cooperate in good faith in order to resolve such problems. The topic should basically be limited to legal problems connected with the nationality and legal capacity of legal entities affected by the succession of States, including perhaps a safety clause confirming the preservation of the property rights of such entities. Any other attempt to protect the property or property rights of legal persons would involve the issue of diplomatic protection or the law on the succession of States in general. It must be borne in mind that article 6 of the 1983 Vienna Convention on Succession of States in respect of State property, Archives and Debts already included a safety clause preserving the property and property rights of natural and legal persons in cases of the succession of States.

5. With regard to reservations to treaties, her delegation fully agreed with the presentation made by the Special Rapporteur on the basis of the existing Vienna regime. The current text of the draft guidelines with commentaries was well balanced and would serve as a basis for the Commission's future work. In 1997, her delegation had maintained that interpretative declarations constituted

unilateral acts of States; however, the explanation that they formed an inevitable part of treaty law was convincing, and her delegation had no objection to the Commission's current approach to that question. Her delegation had noted with satisfaction that the Special Rapporteur had envisaged the possibility that a successor State might make a reservation at the time of notification of succession to a treaty, as established in the 1978 Vienna Convention on Succession of States in Respect of Treaties. That approach confirmed the successor State's right to repeal a reservation made by the predecessor State, or to make a new reservation of its own, in assuming the latter's obligations under that treaty. It must be borne in mind that, while the successor State became party to a treaty as from the date of succession, reservations to treaties became effective upon notification of succession; in practice, considerable time might elapse between those two dates.

6. **Mr. Šmejkal** (Czech Republic) said that his delegation had followed with great interest the work of the Commission on State responsibility, and trusted that it could quickly move towards conclusion of the second reading of the draft articles. With respect to general questions, the provisions on countermeasures would find their proper place in the articles relating to State responsibility, since strictly speaking they were not considered a right of an injured State but one of the circumstances precluding wrongfulness, and were a corollary to the settlement of disputes relating to the exigency of responsibility. The topic must be carefully considered in second reading so as to strengthen the guarantees available under international law.

7. The final content of the provisions on the settlement of disputes would largely depend on the manner in which the draft articles were adopted. Consideration should be given to the adoption of a final text in the form of a declaration setting forth only some of the fundamental principles of State responsibility, which would subsequently be complemented by a convention, although it might be more difficult than anticipated to extract guidelines from the text of the articles.

8. With regard to the distinction between crimes and delicts, his delegation considered that State responsibility in international law was neither civil nor criminal, but international. The Commission had clearly set aside the "criminal" approach to the notion of State crimes, since it encountered insurmountable obstacles, largely the difficulty of applying national criminal law to relations between sovereign States. "To criminalize" State responsibility was merely a theoretical exercise, although naturally that did not preclude the imputation of international criminal responsibility through the mechanism of ad hoc tribunals or the future International Criminal Court to individuals having committed international crimes.

9. It was not essential to use the terminology "delicts" and "crimes" to distinguish between wrongful acts and exceptionally serious wrongful acts, but his delegation had always been in favour of maintaining the fundamental distinction. A unified regime on responsibility would make it impossible to guarantee that certain particularly serious consequences arose solely and exclusively from the breach of norms protecting the fundamental interests of the international community. Undifferentiated responsibility referring, at one extreme, to a minor breach of treaty obligations and, at the other, to acts contrary to the fundamental interests of the international community, could, through its very flexibility, serve to diminish the importance of exceptionally serious breaches of international law.

10. Moreover, the consequences of the "crimes" covered by the draft articles seemed relatively modest, which raised the question of whether the distinction between the two categories of wrongful acts was justified. The Commission might use the second reading of the draft to review the characteristics of exceptionally serious wrongful acts with regard not only to Part Two of the draft articles but also Part One, which, in actual fact, had been drafted with a unified regime approach. The Commission's provisional conclusions indicated a desire to conduct such a review. The fact that such consideration had been conducted not on the basis of the notion of "exceptionally serious wrongful acts" but, rather, on the basis of the specific characteristics of obligations *erga omnes* and obligations arising from peremptory norms (*jus cogens*) and, within the latter category, of "crimes", might be more relevant and useful for the structuring of the regime on international State responsibility.

11. His delegation saw no reason within the topic of State responsibility to draw a distinction between *jure gestionis* and *jure imperii* acts. The distinction was irrelevant in terms of attributing conduct to a State and must not be used to limit in any way the responsibility of a State having committed an internationally wrongful act. Enjoyment, where appropriate, of jurisdictional immunities had nothing to do with the issue of responsibility, which could be determined by means other than recourse to foreign courts. Lastly, the balance between the various provisions of chapter II of Part Two would be improved if the content of the articles on compensation and guarantees of non-repetition was broadened by incorporating, in particular, certain norms of customary international law which had entered into international jurisprudence.

12. **Mr. Al-Baharna** (Bahrain) reviewed the various topics in chapter III of the Commission report, and commented on topics in chapters IV, V, VI, VII, VIII and IX. In connection with international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (chap. IV), he noted that at the 1998 session the Commission had decided to revert to its consideration of the 17 draft articles on the prevention of transboundary damage and to delete those which were most closely related to the question of liability. He commented on some of the articles in the 1998 text, and concluded that the text was much preferable. Nevertheless, the draft articles on prevention would be meaningless if some form of responsibility for failure to comply with the obligation of prevention were not established. It was regrettable that there had been no progress in defining the scope of the regime on liability. It would be reasonable for failure by the State or agent to comply with the obligation to prevent damage to give rise to civil liability and not State responsibility; it would be for the Commission to determine those consequences and to establish compensatory measures in cases where transboundary harm was not prevented.

13. With regard to the topic of diplomatic protection (chap. V), codification of the principles of international law should be limited to codification of the secondary rules dealing with the consequences of diplomatic protection. It was a discretionary right of the State, not the individual, and should continue to be considered as such. As for the fact that some States in Europe had attributed the right of diplomatic protection to their nationals on the basis of domestic legislation, the Special Rapporteur had stated that the obligation was moral rather than legal. It seemed clear that, under customary international law, diplomatic protection could be invoked by a State on behalf of its nationals only after local remedies had been exhausted. He agreed that human rights and diplomatic protection should be considered as separate topics, although it could not be denied that there was a link between them. In short, he endorsed the conclusions of the Working Group on the topic, which were set out in paragraph 108 of the report.

14. Regarding unilateral acts of States (chap. VI) he supported the suggestion by the Special Rapporteur that the Commission should focus on unilateral declarations, leaving aside other, broader categories unilaterally expressing the will of States, such as political unilateral acts, unilateral legal acts by international organizations and acts and conduct by States which, while voluntary, had not been intended to produce specific effects in international law. He also agreed with the Special Rapporteur that, for the time being, the topic should not include unilateral acts of States directed at other subjects in international law. As for the final form of the Commission's work, the study of the topic should take the form of draft articles with commentaries.

15. With regard to the topic of nationality in relation to the succession of States (chap. VII), his delegation preferred the second option suggested by the Working Group of keeping the study within the context of the succession of States, while including other questions such as the status of legal persons. He agreed with the Special Rapporteur that if States did not submit positive comments, the Commission would have to conclude that they were not interested in the second part of the topic.

16. With regard to chapter IX of the report (Reservations to treaties), the crux of the matter was to distinguish between reservations and other unilateral statements made with respect to a treaty, for example, interpretative declarations. In introducing the draft guidelines on reservations to treaties, the Special Rapporteur had stated that the definition of reservations that had been adopted was none other than the composite text of the definitions contained in the Vienna Conventions. In his view, that definition left room for some degree of uncertainty.

17. Commenting in greater detail on the draft, he said that the aim of guideline 1.1.1 (Object of reservations) was to take account of so-called "across-the-board" reservations, although it was assumed that such reservations did not concern the exclusion of the entire text of a treaty and, as such, could not give rise to any particular objection. It could therefore be argued that the guideline related to an across-the-board reservation which concerned not the entire text of the treaty, as that was prohibited under the Vienna definition, but the way in which a State intended to implement the treaty as a whole. As currently drafted, however, the guideline could give rise to confusion between reservations and interpretative declarations. His delegation believed that guideline 1.1.2 was a saving clause for guideline 1.1. As to guideline 1.1.3 (Reservations having territorial scope), his delegation was inclined to regard such statements as genuine reservations under the Vienna Conventions, as their object was to partially exclude or modify the application of a treaty in the territory of the formulating State. His delegation did not concur with the commentary on the guideline, which stated that a territorial reservation could be formulated only if it was expressly provided for in the treaty to which it related; the Vienna Conventions did not admit such a restriction.

18. With regard to guideline 1.1.4, he agreed that a unilateral statement made by a State at the time of the

notification that the application of a treaty extended to a territory constituted a reservation. His delegation supported the provision contained in guideline 1.1.5, on the understanding that an "extensive" reservation, involving a unilateral commitment by the formulating State to go beyond what the treaty imposed on it was not a reservation within the meaning of the Vienna Conventions. Accordingly, he supported the argument of the Special Rapporteur contained in paragraph 524 of the report. With regard to guideline 1.1.7, he shared the view of the Commission that, while joint formulation of a reservation by a number of States could be made, it should not in any way affect the unilateral nature of such a statement.

19. His delegation understood that the additional guideline amounted to stating that the definition of a reservation and its permissibility were two different matters. In other words, a unilateral statement could be defined as a reservation which could later be judged to be impermissible, making it a futile exercise. Accordingly, the question of permissibility should be linked to the definition of the reservation. Lastly, chapter VII of the report (State responsibility) raised some fundamental questions which his delegation wished to study in greater detail.

20. **Mr. Leanza** (Italy), referring to the topic of State responsibility, said that the draft articles should examine not only the requirements for an act to be considered as internationally wrongful, but also the legal consequences of such an act and the dispute settlement procedures. His delegation attached special importance to the fact that the draft referred not only to substantive consequences, namely, the new obligations imposed on the State committing the wrongful act, but also to the countermeasures to be adopted with respect to that State and the conditions under which they were to be applied.

21. His delegation believed that a convention on international State responsibility for wrongful acts should include dispute settlement provisions. In his view, damage was not a constituent element of a wrongful act; he therefore fully endorsed the provisions of draft article 3.

22. He agreed that the draft should refer to State responsibility for exceptionally serious wrongful acts, or "international crimes", and not only to responsibility for ordinary wrongful acts, or "international delicts". Customary international law provided that a breach of certain obligations of fundamental importance for the international community directly infringed the subjective rights of all States and justified invoking the responsibility of the State which had breached those obligations; at issue were breaches of what the International Court of Justice had termed *erga omnes* obligations, including the obligation to refrain from acts of aggression. Customary law also drew distinctions with respect to legal consequences.

23. His delegation believed that the distinctions provided for in the responsibility regime should be codified, clarified and finalized in the draft. In addition, the special regime of responsibility for wrongful acts which harmed fundamental interests of the international community was not a domestic penal regime. The term "international crime" merely denoted the existence of a special scheme of responsibility with respect to the ordinary regime. Moreover, the Rome Statute establishing the International Criminal Court stipulated that it was only in such cases that reference to domestic penal instruments could be made.

24. With regard to Part One of the draft articles, he agreed that article 2 should be deleted, since the concept to which it referred was implicit in article 1, that article 6 and article 7, paragraph 1, should be recast as a single provision (art. 5), and that a new article 8 *bis* should be included. He also endorsed the deletion of articles 11 to 14, which merely stipulated that a given conduct was not attributable to a State except as otherwise provided in other articles. The drafting of article 15 was appropriate, and article 15 *bis* had filled a major lacuna in the 1996 draft, referring to cases in which the State adopted or acknowledged individual conduct as its own conduct.

25. With regard to the possibility of attributing responsibility to a State for any conduct, regardless of whether what was involved was an activity of *jus gestionis* or *jus imperii*, his delegation believed that no importance was attached to that distinction in international practice and jurisprudence. In addition, it was frequently difficult to distinguish between *jure gestionis* and *jure imperii* acts.

26. With regard to the balance between general principles and more detailed provisions, it was especially important to establish principles concerning the consequences of an internationally wrongful act that would be sufficiently acceptable. The more detailed provisions would ensure greater legal security in so sensitive an area as that of international responsibility.

27. With regard to chapter X of the report, he supported the criteria for selecting the topics to be included in the long-term programme of work. He was also of the view that the Commission should not limit itself to traditional topics, but should also consider questions that were more in tune with recent changes in international law and with the most pressing concerns of the international community.

28. **Mr. Pal** (India) said, with reference to diplomatic protection, that the initial outline drawn up for the study of the topic and the preliminary conclusions of the Working Group were worthy of careful consideration. One important aspect was the new emphasis being placed on the rights of the individual and the principle of exhaustion of local remedies.

29. He recognized that unilateral acts had legal effects, particularly insofar as they created obligations for the State performing such acts, and expressed agreement with the Special Rapporteur that unilateral acts represented a source not of international law but of international obligations. The Special Rapporteur had recommended that acts of international organizations, which were merely expressions of political support or cooperation and were not intended to give rise to legal obligations, could be excluded. His delegation believed that acts of States that were clearly regulated by treaty law or the law of State responsibility should also be excluded. By contrast, the legal effect of estoppel should be included. The conditions under which obligations created by unilateral acts could be revoked should also be studied. Before the Special Rapporteur could submit a set of draft articles on the topic, the principles governing unilateral acts should be given a clear, uniform and generally acceptable formulation.

30. He applauded the progress made by the Commission in its second reading of the draft articles on State responsibility. Despite the urgency of completing the task before the end of the current quinquennium, it was important that the second reading should be based on a wide consensus among all States. The legal formulation of the law of State responsibility was, after all, only a means to an end, that of promoting a universal, equitable and just world order.

31. The Commission had made rapid progress on draft articles 1 to 15, which dealt with questions concerning the attribution of State responsibility. With regard to the basic point that such responsibility would give certain rights to the injured State, it had been right to draw a distinction between legal injury and material damage. In that context, it was important to clarify the notion of an injured State as contained in draft article 40, particularly in relation to *erga omnes* obligations, *jus cogens* and State crimes. Responses to violations of community obligations should be graduated according to the proximity of a State to the breach of which it was a victim. The important point was to recognize that designating all States as "injured" and granting them a full range of responses to "crimes", including the right to take countermeasures, could lead to abuse. States generally should be discouraged from seeking self-help mechanisms to serve their special interests in the name of defending the interests of the international community.

32. He agreed with the concept of State crime set out in draft article 19, particularly crimes involving colonialism, apartheid or aggression, which were no less serious for being less frequent than in the past. Moreover, differentiating State crime from the notion of criminal responsibility under national law had the merit of discouraging States from promoting, financing or planning to commit crimes through mercenaries or by proxy. Terrorism financed or practised by a State by proxy should be treated as a State crime which deserved a coordinated and measured response from the international community. He therefore urged the Commission to retain the concept of crime as defined in draft article 19. In that connection, his delegation noted the Commission's interim conclusions on draft article 19, indicated in paragraph 331 of the report.

33. The subject of reservations to treaties had attracted growing interest and had been the subject of a meeting of the Asian-African Legal Consultative Committee held in New Delhi in April 1998. A report of the meeting had been submitted to the Commission.

34. His delegation welcomed the consensus in the Commission on the preparation of a Guide to Practice on reservations that did not disturb the Vienna regime. No distinction should be made between human rights treaties and other multilateral treaties, since the Vienna Convention obviously did not do so. His delegation therefore looked forward with particular interest to the Special Rapporteur's analysis regarding inadmissible reservations and objections to such reservations. Meanwhile it welcomed the draft guidelines on reservations to treaties provisionally adopted by the Commission at its fiftieth session.

35. With regard to nationality in relation to State succession, the Commission should concentrate on the draft articles on natural persons before deciding on the desirability of pursuing the question of the nationality of legal persons, which raised quite separate issues.

36. **Mr. Yin Yubiao** (China) said that State responsibility was composed of three major elements: the existence of an internationally wrongful act, the attribution of that act to a State, and the consequences thereof. An act of State that did not violate international law but produced injurious consequences should be considered in the context of another topic, International liability for injurious consequences arising out of acts not prohibited by international law.

37. The Commission had improved the text of the draft articles currently being considered on second reading. His

delegation agreed to the deletion of the original draft article 2, which stated that any State might be presumed guilty of internationally wrongful acts. As the Special Rapporteur had explained, that draft article expressed a truism and did not directly touch upon State responsibility but only referred to the possibility of such responsibility. Moreover, a State should be presumed to abide by the law, in good faith; that would eliminate some procedural consequences such as burden of proof. An explanation might be included in the commentary on the draft article.

38. In draft article 5, the Drafting Committee had deleted the phrase "under the internal law of that State" after the words "any State organ having that status", on the grounds that reference to internal law in isolation could be misleading since practice and custom were also decisive factors. His delegation believed that it was inappropriate to delete the phrase in question, since internal law was of primary importance in defining the organs of a State and its definition could cover both practice and customs. He agreed that draft articles 13 and 14 should be subsumed into article 15, "Conduct of insurrectional and other movements".

39. With regard to draft article 19, it was unrealistic to introduce the concept of State crime, since the international community was made up of States with equal sovereignty and there was no organ with criminal law jurisdiction over a State. It was also difficult to comprehend that a State that included people in a collective sense could be indicted. Those in favour of including State crime argued that the word "crime" in the law governing State responsibility expressed an exceptionally serious wrongful act that was condemned by the entire international community and caused exceptionally serious judicial consequences. It could therefore not be explained in a criminal law sense. Moreover, the word "crime" could not be stripped of its usual meaning.

40. Acts of aggression or other acts which seriously violated international law were a matter of individual responsibility, as manifested by international practice in the cases of the Nürnberg, Tokyo, former Yugoslavia and Rwanda tribunals. The International Criminal Court currently being established could also investigate the criminal responsibility only of individuals. Moreover, there was ample evidence that in current international practice so-called "State crimes" did not exist. State responsibility could only be civil, not criminal. His delegation therefore suggested that draft article 19 and related articles in Part Two should be deleted.

The meeting rose at 12.10 p.m.

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Held at Headquarters, New York, on Thursday, 5 November 1998, at 3 p.m.

Chairman: Mr. Verweij (Vice-Chairman) ..... (Netherlands)

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Agenda item 150: Report of the International Law Commission (*continued*)

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In the absence of the Chairman, Mr. Verweij (Netherlands), Vice-Chairman, took the Chair.

The meeting was called to order at 3.15 p.m.

Agenda item 150: Report of the International Law Commission (*continued*) (A/53/10 and Corr.1)

1. **Mr. Nagaoka** (Japan), referring to the topic of State responsibility, said that the term "international crimes of the State" used in connection with draft article 19 might have given the erroneous impression that such crimes were similar to the crimes defined under municipal law. However, the Commission had taken an important step forward by agreeing that the concept of international crime did not provide for the penalization of the State. But many unresolved questions remained. In its further work, the Commission should address the question of whether there was a hierarchy of international obligations, taking into consideration developments in international law, particularly with respect to *jus cogens* rules and *erga omnes* obligations. Neither of those concepts had yet been sufficiently clarified. It should also consider whether different regimes of international responsibility should be applied, depending on the seriousness of the breach of the international obligation, whether punitive reparations were to be allowed, how claims by States not directly affected were to be dealt with, and the relationship between the regime of international responsibility and the United Nations collective security system.

2. His delegation welcomed the deletion of redundant articles on the recommendation of the Drafting Committee. With regard to the acts of State organs (art. 5), it thought that both *acta jure imperii* and *acta jure gestionis* might be attributable to the State, although the issue might have to be considered further from the standpoint of jurisdictional immunities and diplomatic protection.

3. **Ms. Steains** (Australia) said that Australia welcomed the Commission's initiatives to promote greater efficiency in its work and would itself endeavour to provide a more timely input; it encouraged other States to do the same.

4. Principles of State immunity were not necessarily applicable in the context of the topic of State responsibility. For example, the distinction between *acta jure imperii* and *acta jure gestionis* was of limited use in the attribution of State responsibility under draft article 5. In that connection, a State should not be able to misrepresent the status of an entity under its internal law and thus avoid responsibility for the acts of what was in fact an organ of the State.

5. Her delegation noted the five approaches, referred to in paragraph 252 of the report (A/53/10 and Corr. 1) for dealing with the difficult issue of whether a State could commit an international crime. It obviously favoured the approaches which would remove international crimes of States from the draft articles, but the issue should indeed be put to one side for the time being. With regard to draft article 35, preclusion of the wrongfulness of an act should not in all circumstances preclude compensation for damage caused by that act.

6. Chapter III of the draft articles constituted a valuable summary of State practice with regard to countermeasures and struck a fair balance between the interests of the injured State and the wrongdoing State. It might be useful for the Commission to consider the relationship between countermeasures and resort to third-party dispute-settlement procedures, which should not necessarily preclude countermeasures.

7. Australia reiterated the importance which it attached to the topic of State responsibility and endorsed the Special Rapporteur's intention of bringing the topic to completion by the end of the quinquennium. It also agreed that the eventual form of the draft articles should be left open for the time being.

8. In chapter III of its report the Commission asked whether in future it might deal with special issues of international environmental law. The Commission's work programme seemed reasonably full in the short and medium terms, and good progress had been made on environmental law through a number of recent treaties. However, should a precise topic be suggested, Australia would consider it.

9. Turning to the topic of diplomatic protection, she agreed that the Commission should refer to primary rules only for guidance in the formulation of a secondary rule. It should address the admissibility of claims and the law relating to the prior conditions for making a claim. Since claims for diplomatic protection often concerned commercial matters and in view of the Commission's work on preconditions for the exercise of diplomatic protection, in particular the "exhaustion of local remedies" rule, it might usefully address such issues as when a person could claim to have exhausted all such remedies and whether ineffective remedies also had to be pursued. The practice indicated that States might protect their nationals even when there was no entitlement to present an international claim. The Commission could usefully provide guidance to States on that question and on the circumstances under which a State was deemed to have espoused a claim.

10. Australia could support the extension of the topic of unilateral acts of States to cover acts not necessarily performed with the intention of creating legal effects or of altering a State's juridical situation under international law. The absence of such an intention should be regarded as an element in determining the legal effects rather than as a predeterminant of the acts in question. The Special Rapporteur had usefully illustrated some of the distinctions between possible categories of unilateral acts of States which relied upon acts of other States for their efficacy. He might also look at a range of "unilateral acts" and consider their effect in international law. In particular, an examination should be made of State practice as well as formal declarations, including the effect of such practice when inconsistent with a rule of customary international law, and actions giving rise to an estoppel against the State. The latter category consisted of independent acts of State, closely akin to declarations.

11. Australia could see utility in drawing upon both options put forward in connection with the work on the second part of the topic of nationality in relation to the succession of States: to expand the study beyond the context of the succession of States or to keep it within that context and include other questions, for example the status of legal persons. It might happen, for example, that a third State (not a successor State) had to choose between the competing claims of successor States with respect to a legal person. The third State would have to determine the "nationality" of the legal person, drawing on rules which might fall for examination under both the options. Information from States which had faced such problems might help the Commission to decide on its future course of action.

12. On the topic of reservations to treaties, Australia agreed with the principle contained in draft guideline 1.1.5 that unilateral statements by which a State purported to increase its commitments or its rights in the context of a treaty beyond those stipulated by the treaty itself were not to be considered reservations for the purposes of the Vienna Convention. "Extensive" reservations were very rarely made, and while they might purport to "modify" a treaty provision, the essence of a "reservation" was to limit a State's obligations. The Special Rapporteur was right to say that any binding force of such declarations derived not from the treaty itself but from principles of general international law governing unilateral legal acts.

13. **Mr. Elaraby** (Egypt) said that the Commission had maintained in its work a correct balance between the progressive development and the codification of international law. In the selection of future topics the Planning Group should focus on questions lying at the heart of international relations, according to the criteria summarized in paragraph 553 of the report. In particular, the topics should be sufficiently advanced in terms of State practice, a criterion not always observed in the past. In 1998 the Commission had issued two valuable publications, and a third was awaited on the proceedings of the International Law Seminar. The progress made in clearing the backlog of the *Yearbook* was also welcome.

14. On the topic of reservations to treaties, Egypt believed that the Vienna regime should be preserved and was glad that the Special Rapporteur had taken as his starting point the definition of reservations in the Vienna Conventions of 1969, 1978 and 1986. However, there was still room for progressive development. The reservations regime should be universally applied and accommodate the requirements of the whole international community, while still respecting the hereditary distinctive characteristics of the members of the international community. For example, the effect of reservations upon the integrity of a treaty should not be overestimated, for reservations did not serve the purpose of a universal regime if they had the effect of excluding some countries. What was needed from the Commission was a flexible system along the lines of the existing one.

15. Interpretative declarations often provided the only way for States to subscribe to a general multilateral instrument, and the Special Rapporteur should consider them in the light of the specific cultures which influenced the legal regimes of nations. He should also bear in mind that the law of treaties did not make a distinction between human rights treaties and other multilateral treaties: there was no reason for a separate regime on reservations to human rights treaties.

16. Turning to the topic of State responsibility, he noted that the Special Rapporteur had made use of the existing rules on the topic. He agreed with the Special Rapporteur's view that obligations *erga omnes* needed further elaboration. With regard to the relationship between the draft articles and other rules of international law, the draft should continue to respect *lex specialis* and the principles of *jus cogens*. It was also important to respect the parallelism between the law of treaties and the law of international responsibility, while making clear the complementarity of the draft articles with the Vienna Convention. For all its imperfections, the reliance on the distinction between primary and secondary rules seemed the most suitable approach in a codification instrument. It might not be practicable to draft detailed provisions on countermeasures and their relationship with third-party dispute settlements. There was no merit in the distinction between "criminal" and "delictual" responsibility of States unless the impact of such a distinction in terms of

differentiated action to be taken against the wrongdoer was also taken into consideration.

17. Diplomatic protection was the only means for State to protect an individual at the international level. His delegation shared the widely held view that the dictum in the *Mavrommatis* case constituted the customary origin of diplomatic protection and its *locus classicus*. Clearly, diplomatic protection was a prerogative of the State as the "sole claimant". However, guidelines were needed to prevent abuses of the discretionary power of States. The Commission should limit itself to secondary rules and discuss primary ones only when necessary. There was an organic relationship between the topics of diplomatic protection and State responsibility, and the Special Rapporteur should draw on the considerable volume of work already done by the Commission in that connection.

18. With regard to the sub-topic on prevention of transboundary damage from hazardous activities, his delegation felt that the obligations with respect to "damage" were unclear as long as the issue of the "duty of prevention" was made hostage to theoretical considerations of "obligations of conduct". Solid legal bases for measuring compliance and identifying the degree of violation were needed. The dispute-settlement mechanism under discussion might in fact compensate for shortcomings in the existing regime, but it should not stop at direct contact between the parties concerned. While the issues likely to come up were amenable to consultation and negotiation, the mechanism should include all other means of dispute settlements consistent with Article 33 of the Charter: damage was damage whether caused by legal or illegal acts. The sub-topic had to be treated with great caution, for it involved technical as well as legal issues and standards which varied from State to State.

19. **Mr. Kachurenko** (Ukraine) said that his Government appreciated the Commission's decision to limit the scope of its study of unilateral acts of States to the unilateral acts of States issued for the purpose of producing international legal effects. In that regard, priority should be given to State acts producing international legal effects, correlation between unilateral acts and international arbitration or judicial procedures and specific legal regimes, revocability of unilateral acts and effects of the silence of a State or acquiescence. His delegation supported the idea that the binding nature of unilateral acts resided in the sovereignty of States and was based on the principle of reciprocity.

20. The statement by the Parliament of Ukraine on the non-nuclear status of that country served as a good example of an internal instrument creating international legal consequences. The international legal obligation of Ukraine arising out of that unilateral act stemmed not only from an internal legal norm but also from those norms of international law that had been formulated thereafter and had been directly called forth by that act. Accordingly, non-compliance with that internal legal norm would constitute a breach of the respective international obligations.

21. Turning to the topic of State responsibility, he said that it seemed useful to draft the articles on the assumption that the rule of *lex specialis* should be transformed into a general principle. His delegation shared the view of the Special Rapporteur that where specific treaty regimes provided their own framework for responsibility of States, that framework would ordinarily prevail, regardless of whether the draft articles took the form of a convention or of a declaration of principles. The form of the draft articles could be decided upon after a generally acceptable text was reached. His delegation supported the proposal to adopt a code of State responsibility under international law that would be similar to a convention by its content while resembling a General Assembly declaration in its binding character. With regard to the distinction between "criminal" and "delictual" responsibility of States, a breach of law by a State should be seen as an internationally wrongful act rather than as a crime, and the concept of "State crime" should not be used in the draft. The Special Rapporteur's proposal that that concept should be either excluded or replaced by the notion of "exceptionally serious wrongful acts" seemed satisfactory. His delegation also supported the view that the law of State responsibility did not require the establishment of criminal and civil responsibility as two different types of responsibility.

22. **Mr. de Saram** (Sri Lanka) said that it was important to consider the relationship between the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law, a relationship found in the problem of transboundary harm. There were different degrees of transboundary harm; the difficulty arose when such harm was catastrophic in nature. In such cases, it would be unfair not to make provision for compensation or for some type of expeditious procedure for the disposal of claims, perhaps through the creation of ad hoc claims tribunals or appropriate shifts in the burden of proof.

23. The Commission had failed thus far to confront the difficulties inherent in the question of the obligation to compensate, and instead had moved into consideration of preventive measures, an area in which he did not think it had any particular expertise. He did not mean to be too critical of the Commission; however, the subject of the obligation

to compensate at the inter-State level in a case of transboundary harm of great magnitude raised difficult issues and uncertainties under international law where authoritative international judicial or arbitral guidance was sparse.

24. The Committee might eventually need to ask the Commission to consider the question of the obligation to compensate in cases of transboundary harm. He was not sure, however, what the better course would be. Perhaps the question might be left to *ex gratia* consideration; some States seemed to be moving towards the provision of compensation for humanitarian reasons.

25. Some held the reasonable view that the question of the obligation to compensate – in a case where no treaty governed – should be considered as a matter of State responsibility. On the other hand, he did not agree with those who believed that under the rules of State responsibility, the only criterion that applied in international law in a case of transboundary harm was the criterion of due diligence, or that what was involved was an obligation of conduct and not an obligation of result. While it was true that State responsibility arose from an internationally wrongful act, further deliberation would be needed on the matter of when, in the absence of a treaty obligation, an international wrong occurred.

26. His delegation had a number of suggestions for the Commission's work on State responsibility: the Commission should complete its work on State responsibility within a year or two; the draft articles should take the form not of a draft convention, but of a declaration of the General Assembly; the draft articles should be limited to the substantive rules of State responsibility alone, and should not enter into the general question of settlement of disputes; and lastly, the draft articles should not include provisions on countermeasures, which should instead be included in the Commission's agenda as a separate topic in its future programme of work.

27. He wished to suggest that the Special Rapporteurs should discuss among themselves and present to the Sixth Committee their ideas on how the Committee's examination of the Commission's report might best be conducted. The Commission might take each of the principal issues of a topic and break them down into their various components, with a view to creating a framework for an active and fruitful discussion. If such an itemization of principal issues was considered helpful by the Commission, the place for such a suggestion would be chapter III of the report.

28. **Mr. Tomka** (Slovakia) noted with satisfaction the progress made by the Commission in submitting to the Sixth Committee a full set of 17 draft articles on prevention of transboundary damage from hazardous activities. His delegation supported the decision made by the Commission in 1997 to divide the topic, and felt that the Commission should proceed first with the second reading of the draft articles on prevention before eventually embarking upon the second part of the topic, i.e., the liability itself. At first glance, the draft articles on prevention seemed to him to be well conceived, since they were aimed at emphasizing the duty of prevention and striking a fair balance between the interests of the States concerned.

29. The duty of prevention was by definition an obligation of conduct, and the Commission should continue to treat it in that way. Failure to comply with the duty of prevention should entail legal consequences under the law of State responsibility. That approach did not exclude the civil liability of the operator who had actually caused the damage, in particular when relevant conventions were applicable.

30. Concerning the final form of the draft articles, his delegation favoured a framework convention rather than a model law.

31. The dispute settlement provisions in article 17 seemed to provide sufficient flexibility when combined with compulsory fact-finding. The details and modalities of establishing a fact-finding commission should be elaborated in an annex and be inspired by the recent example provided in article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

32. Concerning diplomatic protection, he said that Slovakia had welcomed the inclusion of the topic in the Commission's agenda and hoped that it would move towards a formulation of draft articles on the topic, including commentaries. The aim of completing the first reading of a text on the topic by the year 2001 did not seem realistic since the Special Rapporteur had recently been elected a judge of the international tribunal for the former Yugoslavia, and the Commission would have to appoint a new Special Rapporteur. What was needed was a practical approach to the topic based on State practice, with theoretical discussions being kept to a minimum. His delegation endorsed the main conclusion of the Working Group that the customary law approach to diplomatic protection should form the basis of the Commission's work on the topic. The exercise of diplomatic protection was a right of the State and was subject to its discretionary power of decision. His delegation did not share the views of those who suggested that the State, when exercising diplomatic protection, was simply acting as an agent of its national who had a legally protected interest at the international level. The Special Rapporteur

and the Commission should focus on the admissibility of claims and the preconditions for the exercise of diplomatic protection. Slovakia considered that diplomatic protection should not be linked to human rights issues in the draft articles on the topic. Those two institutions of international law were separate and fulfilled different functions.

33. His delegation was not fully convinced of the need to change the title of the topic to "Diplomatic protection of person and property", as suggested by the Special Rapporteur in his preliminary report. The Commission should proceed first to the codification of rules concerning diplomatic protection of natural persons, where a substantive body of law already existed, and only later turn its attention to the issue of the diplomatic protection of legal persons.

34. It was very important to reach agreement on the scope of the topic of unilateral acts of States, and it would be advisable to elaborate a definition of a unilateral act to which the rules to be formulated by the Commission would be applicable. He endorsed the suggestion by the Special Rapporteur that the Commission's work should focus on those unilateral acts of States which were strictly or purely unilateral in nature, of an autonomous character and intended to produce legal effects. He also shared the view that certain categories of unilateral acts should be excluded from the study, namely unilateral political acts, unilateral acts of international organizations, unilateral acts of States which gave rise to international responsibility, and unilateral acts falling within the scope of the law of treaties.

35. Slovakia subscribed to the general feeling in the Working Group with regard to the form which the work on the topic should take, namely the elaboration of possible draft articles with commentaries, without necessarily prejudging the final legal status which might be given to such draft articles. Slovakia also supported the recommendation of the Working Group to the Special Rapporteur concerning his future work. Nevertheless, his delegation had not been persuaded by the arguments of those who considered that the Special Rapporteur should examine the questions of estoppel and silence with a view to determining what rules, if any, could be formulated in that respect in the context of unilateral acts of States. Those issues were outside the scope of the topic.

36. With respect to specific comments requested by the Commission, Slovakia agreed that the scope of the topic should be limited to declarations, but did not see any particular reason why the topic should not be extended to unilateral acts of States issued to other subjects of international law, namely intergovernmental organizations.

37. The topic of nationality in relation to succession of States was of great relevance to his country which, together with the Czech Republic, had quite recently undergone a process of State succession, following the dissolution of the former Czech and Slovak Federal Republic. His delegation would shortly submit written comments on the set of 27 articles on the topic which the Commission had adopted in 1997.

38. Concerning the second part of the topic, namely, the question of the nationality of legal persons in relation to succession of States, he noted that Slovakia had not faced any practical problems in that respect after the dissolution of the former federation. That could be explained by the fact that both States had generally maintained the legal order of the former federation, according to which the nationality of a legal person was determined by its registration in the commercial records maintained by the district court where the headquarters of a company were located. His delegation did not see any practical need for the Commission to pursue that part of the topic, although it would not oppose such a course of action if some other States found that it would be useful. His delegation had serious doubts about the first option outlined by the Working Group, namely that the study of the question of the nationality of legal persons might be expanded beyond the context of the succession of States to the question of the nationality of legal persons in international law in general.

39. State responsibility was the most important, and also the most complex, item on the Commission's agenda. The draft articles provisionally adopted by the Commission on first reading had already had an impact on State practice and had recently been referred to by the International Court of Justice in a decision. He suggested that the Commission should prepare its final draft of the articles with a view to the adoption of a convention. He supported the proposal to combine draft articles 5 and 6; however, he saw no reason to distinguish between *acta jure gestionis* and *acta jure imperii* since an official act of any State organ, regardless of its nature, was attributable to that State.

40. With regard to draft article 19, while he recognized that State responsibility was neither criminal nor civil in nature, he did not think that it would be justified to omit any distinction between different categories of internationally wrongful acts from the draft. Perhaps the word "crime", which was somewhat misleading, could be replaced by a more appropriate term.

41. He supported the decision of the Special Rapporteur on reservations to treaties to establish a definition of reservations and interpretive declarations before embarking

on other aspects of the topic and endorsed the draft guidelines adopted by the Commission at its 1998 session.

42. The Commission had asked Governments to comment on whether unilateral statements by which a State purported to increase its commitments or its rights in the context of a treaty beyond those stipulated by the treaty itself would or would not be considered as reservations. In his view, a declaration purporting to increase a State's commitments did not constitute a reservation since it did not limit the legal effect of certain provisions of the treaty in their application to that State, although it might be subject to the rules which governed unilateral acts. A unilateral statement which purported to increase a State's rights and, by so doing, to impose further obligations on other parties to the treaty, did not constitute a reservation, but rather an offer to conclude either a modified form of the treaty or a parallel treaty relationship in addition to the primary treaty. In either case, the consent of the other parties to the treaty was required.

43. **Ms. Telalian** (Greece), referring to chapter IV of the report, said that she fully concurred with the emphasis which the Commission had laid on the prevention of transboundary harm as a preferred policy. She also agreed with the approach whereby a State was obliged to prevent or minimize the risk of causing significant transboundary harm and could incur responsibility by violating that obligation, which, as reflected in draft articles 3, 6, 7, 8 and 10–13, appeared to be based on the rule of due diligence. Draft articles 10, 11 and 12 balanced the interests of both sides and contained elements which further emphasized the non-absolute character of that duty of prevention. However, the expression "reasonable time", in draft article 10, was too vague and should therefore be more precisely defined. Her delegation currently had no fixed position on the specific questions posed by the Commission as to whether the duty of prevention should continue to be treated as an obligation of conduct or be instead subjected to the law of State responsibility. It would, however, give careful consideration to those delicate questions, to which the Commission should attach the utmost importance in its future work, taking into particular account the ongoing effort of the international community to strengthen the principles of international environmental law. The compulsory fact-finding procedure provided for in draft article 17 on settlement of disputes seemed to be the most effective way of objectively determining the relevant facts. She failed to see, however, why initiation of the procedure should be delayed for six months in the absence of agreement between the parties.

44. Having stressed the importance which she attached to the Commission's consideration of the question of reservations to treaties as a matter of first priority, she observed that the Vienna Conventions were unclear concerning the legal effects of incompatible reservations, particularly those raised in connection with human rights treaties. The same confusion was equally apparent in the State practice concerning the system of objections and acceptances to impermissible reservations, while there was an urgent need to ascertain the conditions under which a State could make reservations with purported legal effects and become a party to the treaty. The Commission should thus find appropriate ways of facilitating the practical application of the complex system of reservations and their acceptance by States.

45. She had no problem with the definition of reservations contained in draft guideline 1.1; the attempt to arrive at a clear definition had theoretical value and was also of great practical importance to States in determining the permissibility of a reservation. Under the Vienna definition, the name applied to a unilateral statement was of little importance. Instead, it was more important to tackle the question of whether a unilateral statement was a reservation on the basis of safe and well-defined criteria. Reservations aimed at clarifying the meaning of a provision were interpretative declarations, a distinction that seemed clear enough *in abstracto*. In actual practice, however, there were many instances where the purport of interpretative declarations went further. Such confusion and ambiguity could therefore be clarified with the adoption of draft guideline 1.2, which defined interpretative declarations.

46. She agreed with the Special Rapporteur that a formalistic approach concerning the form of a reservation was unnecessary and also agreed with draft guideline 1.1.7 concerning reservations formulated jointly. She further agreed with the clarification concerning the object of reservations contained in draft guideline 1.1.4, although she did not accept that a unilateral statement by which a State intended to commit itself beyond its treaty obligations constituted a reservation. The same applied to statements relating to the non-recognition of States, which should instead be governed by the law on State recognition. Lastly, she concurred with draft guideline 1.1.3, which reflected well established practice in the field of reservations having territorial scope.

47. **Mr. Kocetkov** (Bosnia and Herzegovina), referring to chapter IX of the report, said that draft guideline 1.1 comprised an acceptable definition of reservations to treaties. In its future work on the complex and delicate issues involved in the topic, the Commission should pay particular attention to defining clearly the criteria for determining the impermissibility of reservations and interpretative declarations. As a successor State, his country was interested

in a review of the possibility whereby, as in the case of newly independent States, new States that had emerged from the dissolution of a former State could express reservations and interpretative declarations when notifying their succession to a treaty, thus enabling them to achieve equality of treatment and position in terms of international law.

48. **Mr. Chee** (Republic of Korea), referring to chapter VI of the report, noted that the Commission had seemingly embarked on the enormous task of identifying unilateral acts of States, which should be completed prior to any codification. Elaborating on his delegation's written comments on the draft articles on State responsibility, he said that draft article 19 served no useful purpose and should be deleted, as it was inappropriate to equate a sovereign State with a common criminal by describing its conduct, however brutal, as "penal", for it was the penal act of an individual which rendered a State culpable of a penal act. In such instances, the term "international wrongdoing of a State" should suffice. Further pedantic debate on the distinction between "criminal" and "delictual" responsibility would be unproductive and time-wasting. Furthermore, in view of the recent establishment of the International Criminal Court, he believed that consideration of the subject of international crimes could be deferred.

49. Concerning the draft guidelines on reservations to treaties, he expressed concern over the lack of any clear distinction between reservations to treaties and interpretative declarations, which was admittedly difficult to achieve. Having quoted the definition of a reservation contained in article 2 of the 1969 Vienna Convention, he referred to the discussion of its elements contained in the ninth edition of *Oppenheim's International Law*, in which it was observed that it was the substance of a unilateral statement rather than its nomenclature, which determined whether it constituted a reservation, and that some unilateral statements did not purport to exclude or modify the legal effect of certain provisions of a treaty. The author had added that borderline cases would inevitably arise involving in particular interpretative declarations, and then the question of whether they constituted reservations, could only be answered on the merits of each particular instance. With those comments in mind, he endorsed the Special Rapporteur's suggestion that a definition of interpretative declarations should be included in the Guide to Practice, although he was uncertain as to how successfully it could be applied. As matters stood, however, he was disappointed by the failure to achieve a clear distinction between the two concepts and hoped that further efforts would be made to do so, particularly since the practice of making interpretative declarations was currently becoming more common.

50. **Mr. Crawford** (Special Rapporteur on State responsibility) said that he welcomed the Committee's decision to permit the Commission's Special Rapporteurs to address it and that it was not too late for Governments to transmit their comments to the Special Rapporteurs; however, in order for such observations to be as useful as possible, they should be received by early 1999.

51. There was general support for the core concept established in draft article 4. The issue of damages remained to be resolved but, in his opinion, there was greater consensus on that matter than might appear. Some delegations took the view that damages were the essence of responsibility in all cases; however, appropriate penalties varied according to the nature of the primary rule that had been breached. For example, in the case of transboundary pollution, actual harm must have occurred before damages were called for, as stated in the Helsinki Principles and the Rio Declaration. In other cases, mere violation of a norm entailed damages, as in the case of a violation of diplomatic immunity through detention of a diplomat, even under optimum conditions, or infringement of a State boundary, even when no harm ensued. Thus, it was the formulation of the primary rules which determined the question of damages.

52. With regard to draft articles 5–15, which dealt with the concept of attribution, he welcomed the consensus in the Committee that the distinction between *jure imperii* and *jure gestionis* was irrelevant in that context, although not in that of immunity. While there was general support for the Commission's amendments to articles 5 and 8, there was less agreement on the issue of State crimes, a matter on which the Commission had also failed to reach consensus. It was clear that the existing text, which established but failed to develop a distinction between crimes and delicts, required amendment. There appeared to be general agreement that the terms "penal", "criminal" and "delictual" were not indispensable and that it was the substance of the matter which was most important. Furthermore, it was clear that the notion of criminal law and criminal sanctions, in the context of national legal systems, were wholly inapplicable to States under international law. While the idea of prosecuting States themselves had a certain appeal, such a concept was wholly unrealistic. Thus, State responsibility was neither civil nor criminal in the normal sense.

53. However, some wrongful acts, such as genocide and aggression, were far more serious than ordinary breaches of international law which could be resolved bilaterally, while other breaches entailed State responsibility because their consequences affected the international community as a whole. Giving full effect to that concept might provide a solution to the apparent dilemma posed by article 19.

54. The Commission planned to conclude its work on State responsibility by the year 2001. At its next session, it intended to complete its work on articles 16–35 (Part One) and to make as much progress as possible on Part Two. The issues of countermeasures and dispute settlement would require further consideration and, in my case, there was no consensus on whether they should be included in the draft. The Commission would then devote the rest of the quinquennium to settling the question of article 19, determining the final form of the draft articles and producing a full text with commentary.

55. **Mr. Baena Soares** (Chairman of the International Law Commission) expressed the hope that the Committee would continue its practice of allowing the Commission's Special Rapporteurs to address it and that the Commission would be able to continue to divide its session into two parts and to meet in both New York and Geneva. During the past few years, the Commission had improved the methods and quality of its work in order to better fulfil its mandate and increase its relevance to international law. However, there was a need for further measures to ensure that Governments received the Commission's report in time to prepare adequate comments. The Commission's success was dependent on the Committee's support and cooperation and on the observations, information and statistics provided by Governments. While written replies were always appreciated, oral statements were also taken into consideration by the Commission.

56. **The Chairman** said that the contributions of the Special Rapporteurs and Chairmen of the Commission had resulted in an extremely useful dialogue which he hoped would continue. Discussion of the 1998 report of the Commission had been a highlight of the Committee's work during the current session of the General Assembly.

The meeting rose at 5.30 p.m.

United Nations A/C.6/53/SR.23

General Assembly
Fifty-third session

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Sixth Committee

Summary record of the 23rd meeting
Held at Headquarters, New York, on Monday, 9 November 1998, at 3 p.m.

Chairman: Mr. Verweij (Vice-Chairman) ..... (Netherlands)

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Agenda item 148: Convention on jurisdictional immunities of States and their property

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98-82228 (E)

In the absence of Mr. Enkhsaikhan (Mongolia), Mr. Verweij (Netherlands), Vice-Chairman, took the Chair.

The meeting was called to order at 3.15 p.m.

Agenda item 148: Convention on jurisdictional immunities of States and their property
(A/53/274 and Add.1)

1. **Ms. Cardoze** (Panama), speaking on behalf of the Rio Group, said that an international treaty setting forth the basic principles of jurisdictional immunity would help eliminate uncertainty in the conduct of international relations.

2. The Rio Group supported the idea of convening a conference of plenipotentiaries, as provided for in General Assembly resolution 49/61, and believed that the time had come for the Sixth Committee to resume its work on the proposal. A working group should be established during the fifty-fourth session of the General Assembly to identify in greater detail those aspects of the draft articles prepared by the International Law Commission that might need adjustment. It would serve no purpose to continue postponing discussions on such an important topic.

3. **Mr. Nagaoka** (Japan) said that historical perspectives should be taken into account in considering what kinds of State conduct enjoyed jurisdictional immunities. In recent years, State organs had greatly expanded, and their work was closely related to the activities of individual citizens. Thus, the idea that State organs could enjoy absolute immunity, no matter what conduct they engaged in, was no longer valid. That did not mean, however, that the idea of jurisdictional immunities should be abandoned entirely.

4. State practices regarding jurisdictional immunities were based on either the doctrine of absolute immunity or on that of restrictive immunity; that led to confusion in the rules of international trade. It would therefore be useful to conclude a convention that allowed sufficient flexibility to ensure the wider participation of States and the harmonious development of State practices. In that regard, the approach taken and the basic ideas expressed in the draft articles on jurisdictional immunities of States and their property remained valid (A/49/10, chap. II.D), and provided a solid basis for further discussion. Some aspects of the draft articles, however, reflected State practices which had prevailed during the cold war era. Recent developments in the field, particularly during the 1990s, should be taken into account. His delegation supported the establishment of a working group during the fifty-fourth session of the General Assembly, as provided for in resolution 52/151. It would be helpful if the International Law Commission could submit to the Sixth Committee its comments on the draft articles in the light of recent developments. Nevertheless, the work of the Commission must be regarded as supplementary to that of a working group, and reconsideration of specific articles by the Commission would not be acceptable.

5. **Mr. Gao Feng** (China) said that since the end of the Second World War, the functions of the State had become more complex, and there were more instances of States engaging in international trade and transactions on their own behalf. Some of those commercial transactions were for profit, but others sought to promote public welfare, for example, purchasing wheat for disaster relief purposes. If a State engaged in a transaction in order to promote public welfare, it was obviously inappropriate for a foreign court to exercise jurisdiction over the State when it had not expressly given up immunity beforehand. There were also many instances of State enterprises engaging in commercial transactions on their own behalf, and as independent entities they should be responsible for their own operational activities. If they were authorized by the State to engage in commercial transactions on its behalf, then in accordance with the principle of agency in ordinary civil law the State should be responsible for the operational activities of those State enterprises. There were many other important issues of principle concerning States and their property on which international law offered no uniform theoretical model. Among the great majority of States, the question of immunity had been handled in accordance with the general principles of civil law and practice in their domestic legislation. In some States, practice had not been consistent over time.

6. Precisely because international practice and international law varied on the question of State immunity, it was necessary to discuss and draft an international convention. Nevertheless, there was still no broad consensus on the matter, and the solution of the problem depended on the further development of international practice and the corresponding development of theory. In the view of his delegation, the time had not yet come for the convening of a diplomatic conference to conclude a convention on the matter of jurisdictional immunities of States and their property.

7. His delegation supported the establishment of a working group during the fifty-fourth session to consider the issues that still needed to be resolved.

8. **Mr. Alabrune** (France) said that his delegation was in favour of drawing up an international convention on jurisdictional immunities of States and their property. An international convention would help limit the proliferation

of legal norms and ensure greater uniformity in the law on the subject. As agreed by the General Assembly in its resolution 52/151, a working group of the Sixth Committee should be set up during the fifty-fourth session.

9. His delegation doubted the need to ask the International Law Commission for additional comments, but if that course were followed the Committee would have to specify the issues involved. In that context, given that very few States had submitted written replies on the draft articles, although his own delegation had done so in June 1997, it would be paradoxical to ask the Commission to take account of State practice. Moreover, any consultations with the Commission should not cause the Committee to lose sight of the General Assembly's often expressed aim – for example in its resolution 49/61 – that an international conference of plenipotentiaries should be convened to conclude a convention on the subject.

10. **Mr. Politi** (Italy) said that his delegation would like to see the adoption of a widely accepted international convention on jurisdictional immunities of States and their property which would provide States and private parties with greater certainty on a wide range of litigations and would also be of great benefit to international trade. His Government was ready to contribute towards the search for balanced solutions to unresolved issues; however, Italy could not renounce some important features of its long tradition in the area of jurisdictional immunity unless truly widespread agreement was reached. It would make little sense to abandon a long-established court practice for a convention that would be applied in a limited number of countries.

11. His delegation supported the idea of continuing the discussions on the draft articles adopted by the International Law Commission and establishing, at the fifty-fourth session of the General Assembly, a working group of the Sixth Committee. It also agreed with the proposal to invite the Commission to present, before the fifty-fourth session, its comments and recommendations on the draft articles, in the light of the results of the informal consultations held in the Committee in the past and taking into account the most recent developments with respect to State practice. At the same time, his delegation was not sure that it would be desirable to set specific deadlines for the conclusion of the discussions in the working group or to envisage, at the current stage, the convening of a diplomatic conference for the adoption of a convention. It would be preferable to assess the results achieved by the working group before deciding on any further steps to be taken.

12. **Mr. Rosenstock** (United States) said that his Government could not accept the draft articles on jurisdictional immunities of States and their property in their current form. Without a clear and unequivocal provision incorporating the nature-only test, his Government would not be able to accept the convention. There was still no consensus on the matter, and trying to force the issue would only harden positions rather than facilitate consensus. It would not be productive to establish a working group at the fifty-fourth session of the General Assembly. The idea of asking the International Law Commission to take the matter up again, in addition to establishing the working group, seemed overambitious and premature. If a working group was set up at the fifty-fourth session, it might indeed decide that the Commission should be asked to reconsider certain specific issues. If, on the other hand, there was some basis for believing the Commission could make progress without direction from the Sixth Committee, it should be allowed to do so, and the Committee could then decide whether it made sense to establish a working group. If the Commission was not allowed to reopen existing articles, however, it was not clear what it would be able to accomplish. Considering the number of working groups that were being proposed for the fifty-fourth session of the General Assembly, it would not be wise to schedule one on jurisdictional immunity unless there was a reasonable basis for believing it would be useful.

13. **Mr. Marechal** (Belgium) said that although the status of diplomatic and consular missions – which acted as representatives of States – was governed by the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, there was no framework of universal norms defining the jurisdictional immunities of States themselves. The elaboration of a convention on the matter would allow for greater harmonization of the rules applied by States in the conduct of their international relations. His delegation was in favour of setting up a working group at the fifty-fourth session of the General Assembly to study the most important aspects of the draft articles.

14. **Mr. Kachurenko** (Ukraine) said that his delegation supported the proposal to elaborate a convention on jurisdictional immunities of States and their property with a view to convening a diplomatic conference for the purpose of adopting such a convention. The establishment of a universal legal regime in that area would clarify the grey areas in international law and eliminate the existing disparities in practice. The draft articles drawn up by the International Law Commission should be used as the basis for the future convention. His delegation realized that there were still differences among States on several key issues

relating to the draft, but trusted that most of them could be resolved by delegations in the framework of a working group. The working group should carefully examine issues of substance in order to facilitate the conclusion of a convention and make concrete recommendations on how to address any issues that might be left pending for the conference. Sufficient time should be allocated for the meetings of the working group.

15. **Ms. Dickson** (United Kingdom) said that, conscious of General Assembly decisions on the issue, her delegation would address not the substance of the item but merely the course of action that the Committee should pursue. A working group should be established for the fifty-fourth session to examine the major issues relating to jurisdictional immunities in the light of recent developments in State practice and national legislation. It should also consider whether there were any specific issues on which the Commission's comments might be necessary. The working group, and subsequently the Commission, would thus have an opportunity to comment within a reasonable space of time. If the issue went back to the Commission, as her delegation would prefer, following consideration by the working group, it should be allowed more than one session and should be given specific issues to consider. Her delegation did not favour a general referral in the expectation of recommendations from the Commission in 1998.

16. **Mr. Lavalle Valdés** (Guatemala), after endorsing the statement by the representative of Panama on behalf of the Rio Group, said that the jurisdictional immunities of States and their property effectively belonged to the body of customary international law in cases where States acted *jure imperii*. Outside such specific cases, however, and despite the importance of the issue for international relations, international law played a passive role; no regime of what had been termed "ordered freedoms" had been established. The reason for that was that, despite the growth of international activity by States and the development of ideas, no new customary rules relating to jurisdictional immunities, nor a treaty of universal scope, had come into being. That had left the field open for some States to adopt detailed regulations and a regional convention. As a result, existing regulations owed more to comparative public law than to public international law of general application. The situation was potentially harmful. On a delicate and complex issue, which might become even more crucial in the future, there was no general law covering the basic issue. The situation was particularly strange in comparison with the status of diplomatic relations: diplomatic immunity was guaranteed under the Vienna Convention on Diplomatic Relations, to which 178 States were party and which had come to have the force of customary law.

17. That was why his delegation had, in 1991, supported the convening of an international conference of plenipotentiaries and, in 1994, been party to the General Assembly's adoption of its resolution 49/61, even though the latter was vitiated by the fact that the Assembly had not only omitted to set a date for such a conference but had deferred consideration of it until the fifty-second session. That deferral would have been understandable if there had been too little progress in examining the issue, but, as the relevant documents amply showed, the issue had been fully discussed. The time for action had come, yet General Assembly resolution 52/151 disappointingly restricted itself to the possibility of establishing a working group at the fifty-fourth session. It was to be hoped that such indifference to the issue, whether real or apparent, could be overcome and that the Commission's work could finally bear fruit.

18. **Ms. Telalian** (Greece), expressing her delegation's support for the elaboration of a convention establishing a uniform regime which would give greater security to States and eliminate existing disparities, which were due to the wide variety of national rules, said that a working group should be established at the fifty-fourth session in accordance with General Assembly resolution 52/151, with a view to the convening of a conference in the near future. The working group should consider unresolved issues and seek a compromise on the basis of the draft articles. Her delegation doubted the usefulness of asking the Commission to submit supplementary observations, in view of the poor response of States to the draft articles. If the Commission were requested to review specific problems, however, that should not be at the expense of the diplomatic conference.

19. **Mr. Morshed** (Bangladesh) said that the Commission's work on a complex and difficult subject constituted a major achievement towards the unification and codification of possible rules on the jurisdictional immunities of States and their property. His delegation supported the suggestion by the representative of Japan that a working group should be established at the fifty-fourth session and that a flexible referral of the issue should be made to the Commission for further comments.

20. **Ms. Cueto Milián** (Cuba) said that her Government had had recent direct experience of its property being subject to a unilateral interpretation by some States of the principles governing the jurisdictional immunities of States and their property. Any harmonization of rules would have to reconcile the principle of *par in parem imperium non habet*, and recent developments in international law, with the

current policy of States and the conceptual philosophy of the issue. The Committee should be governed by General Assembly resolutions 49/61 and 52/151, both of which contained clear provisions for future action. She saw no need to request further comments from the Commission, particularly since it was not obvious what issues it should consider. The Commission had a full agenda as it was. The Committee should simply establish a working group for the fifty-fourth session, in accordance with General Assembly resolutions.

21. **Mr. Šmejkal** (Czech Republic) welcomed the Commission's adoption of the draft articles on a complex and difficult issue. As the representative of Guatemala had said, it was regrettable that the issue was governed by customary international law. The relevant Czech domestic legislation was extremely sketchy, so the unification of international law would be most welcome and action should be taken to that end. The draft articles constituted a good basis for further work, but there was disagreement in some areas. Recalling that the issue had been under consideration already for many years, he said that a working group could move to bring together conflicting views, particularly with regard to the definition of a "State" and of "commercial transaction", although the latter task might be difficult; the same was true of the question of State immunity from measures of constraint. The Committee should not, however, be deterred by the possible difficulties. The working group should be established. A contribution from the Commission might be useful, but only on a flexible basis; in that way it could make recommendations within a short period of time without jeopardizing the establishment of the working group in 1999.

The meeting rose at 4.20 p.m.

United Nations A/C.6/53/SR.24

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Sixth Committee

Summary record of the 24th meeting
Held at Headquarters, New York, on Tuesday, 10 November 1998, at 3 p.m.

Chairman: Mr. Mochochoko (Vice-Chairman) ..... (Lesotho)

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Agenda item 156: Review of the Statute of the Administrative Tribunal of the United Nations

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98-82258 (E)

In the absence of the Chairman, Mr. Mochochoko (Lesotho), Vice-Chairman, took the Chair.

The meeting was called to order at 3.20 p.m.

Agenda item 156: Review of the Statute of the Administrative Tribunal of the United Nations

1. **Mr. Alabrune** (France) said that his delegation, recognizing the importance of the United Nations Administrative Tribunal, had four proposals for ways of improving the Tribunal's statute. First, the principle should be established that candidates for membership of the Tribunal should have a recognized legal qualification. The first sentence of article 3, paragraph 2, could be amended along the following lines: "The members shall be appointed by the General Assembly for three years from among persons with a higher education and/or recognized professional experience in legal matters.". Secondly, his delegation would support the extension of the term of office. The current period of three years did not give a member enough time to acquire the judicial experience and thorough legal knowledge required, while the frequent reappointments, although compensating for the short terms of office, introduced an element of uncertainty into the composition of the Tribunal. The term of office could usefully be extended to at least four years.

2. Thirdly, it would be appropriate to give greater emphasis to the fact that the Tribunal was a court of law. To that end, members of the Tribunal could be designated "judges", the Executive Secretary could become the "Registrar" and the secretariat the "Registry". Lastly, in accordance with article 3 of the statute and article 6 of the rules, a maximum of three members sat in any particular case. Admittedly, that enabled the Tribunal to deal with a relatively large number of cases – about 20 – at each session, but it also meant that, in a given case, just two members might be responsible for a judgement, if agreement was not reached and a vote was taken. Although such situations were rare, they weakened the Tribunal's authority. For that reason, it might be appropriate, when consensus had not been reached, for at least the most important cases to be heard before the full Tribunal, in accordance with criteria to be determined. The full Tribunal would then take its decisions by a majority vote. Article 3 of the statute and article 6 of the rules could be amended accordingly.

3. **Ms. Dickson** (United Kingdom) said that her delegation was anxious to ensure that the statute of the Tribunal was updated when necessary, in order that the Tribunal's work could be carried out as efficiently and expeditiously as possible. Following the valuable amendments to the statute contained in General Assembly resolution 52/166, there were a number of other amendments that could usefully be made in order to reflect the important and increasingly complex legal decision-making which the Tribunal faced and to bring the statute into line with the statutes of other international courts, particularly those that had come into being in more recent years.

4. Her delegation concurred with the statement by the representative of France. First, members of the Tribunal should all be required to have an appropriate legal qualification. The statute – somewhat surprisingly – omitted any mention of qualifications for its members; in view of the increasing complexity of the issues before the Tribunal and the potential impact of its decisions on United Nations staff and others, however, it had become essential for the members to be legally qualified, perhaps even with a specific qualification in labour or administrative law.

5. A second useful amendment would be to provide for a slightly longer term of office. The current appointment to a three-year term was out of line with the practice of most other international courts: the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda both provided for four-year renewable terms of office, while the International Court of Justice and the International Tribunal for the Law of the Sea provided for renewable nine-year terms, as would the International Criminal Court, although in that case it would be non-renewable. Her delegation therefore proposed that the term of office of members of the United Nations Administrative Tribunal should be increased to four or five years, still on a renewable basis. That would allow members to make proper use of the expertise gained in the earlier part of their appointment.

6. Lastly, her delegation proposed that in particularly important cases there should be a possibility of having a decision taken by all seven members of the Tribunal instead of a panel of three. The current provision in article 3 of the statute that only three members might sit in any particular case was presumably intended to enable the Tribunal to spread its resources more widely, but there might well be cases of significant importance which would benefit from being heard by all the members. The Tribunal should not be prevented from sitting in that way when it considered it necessary or desirable to do so.

7. The Tribunal's judgements were of enormous importance for the fair administration of the Organization and of the other entities whose staff came within the Tribunal's jurisdiction, and her delegation had the highest

respect for the way in which it carried out its functions. Her proposals were put forward in a constructive spirit, with the aim of assisting the Tribunal. Although her delegation had originally hoped for action on the proposals at the current session, it had decided that there might be some benefit in deferring the matter until the next session. By giving other delegations time to reflect, further ideas for updating the statute might emerge and, if so, all the proposals could be considered together.

The meeting rose at 3.35 p.m.